An Exploration of Juvenile Records Maintenance Across America:

A Way Forward for the Commonwealth

Northeastern University School of Law
Legal Skills in a Social Context
Social Justice Program

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Executive Summary

I. Introduction

When juvenile courts were first established in the United States over 100 years ago the goal was to remove juveniles from the punitive system of criminal courts and encourage rehabilitation based on the individuals' needs. This system was meant to differ from the adult criminal court in a number of ways. It was to focus on the child or adolescent as a person in need of assistance, not on the act that brought him before the court. Most importantly, this system was created to shield juveniles from experiencing the widespread and negative collateral consequences of being a "criminal," by limiting the consequences experienced by juveniles to only those directly related to the specific delinquent act committed.

However, in an age where information can be shared quickly and easily to a wide audience, juvenile records systems present a roadblock to the concept of rehabilitation. The intended focus of the juvenile justice system is the welfare of the minor and not the offense. However, juvenile records have created a culture that is quite opposite in its focus. Where the juvenile justice system operates to assist juveniles and their families, the records that are produced by the system often end up being used to the detriment of the juvenile and their families; inhibiting a youth's education, career and in some cases ability to find adequate housing.

In Massachusetts the juvenile courts' ability to meet the original goals of the juvenile justice system are obstructed by the practices employed in keeping and disclosing juvenile court and arrest records. In an effort to better understand the complicated effect these practices can have on juveniles, and the overall functioning of the juvenile justice system, the Massachusetts Office of the Child Advocate (OCA) partnered with Northeastern University School of Law to create a social justice project as part of a requirement for first year students. The project

consisted of conducting legal research, developing a survey of the 50 states and their respective approaches to the treatment of juvenile records, numerous field interviews, and compiling recommendations for the best approach in dealing with juvenile records in the Commonwealth.

II. Massachusetts Practices

A. Current Practices

At present, Massachusetts allows records to be sealed but not expunged. Once sealed, a record is withheld from public inspection and is only accessible with the court's consent. The Massachusetts' legislature does protect the confidentiality of juvenile records from the general public, however, records are available to numerous organizations including: schools where the juvenile is currently registered, future employers, local law enforcement agents, social services personnel, the armed forces, and the Commonwealth's judiciary. These records contain detailed reports of the incident and the final outcome of the delinquency case, and contrary to popular belief these record do not disappear when the juvenile reaches the age of majority.

B. Legislative History

The Commonwealth has gone through three distinct phases of legislative proposals regarding the regulation of juvenile records. During the first phase, beginning in the early 1970's, the legislature focused on providing privacy and restricting access to juvenile records. The second phase, starting in 1978, focused on decreasing the confidentiality of juvenile records by allowing greater public access to juvenile record information. Finally in 2003, the third and current phase began, retracting some of the more lenient record sharing measures adopted after 1978 and moving towards a higher degree of confidentiality for juvenile records.

These distinct phases highlight the competing policy concerns that are central to the issue of retaining juvenile records. As this legislative history shows, at one point the Commonwealth's

legislature focused on the traditional mission of the juvenile justice system to protect juvenile offenders, while at other points the legislature has chosen to make the system more transparent in an effort to protect public safety.

III. Competing Policy Initiatives

A. Historically

When the first juvenile court was established in 1899, proponents of the new system relied heavily on scientific advances in the study of psychiatry, which established that children were extraordinarily impulsive, immature, and incapable of understanding or controlling their conduct. These factors, coupled with the understanding that children are often unable to avoid misconduct because of other emotional pressures, led society to determine that juveniles are less culpable for their conduct and more amenable to reform. It was determined that youths were more malleable and should be treated as individuals in need of rehabilitation and not criminals to be punished.

Early on, confidentiality was identified as an important component of rehabilitation. Reformers hoped that confidential proceedings would protect juveniles, whom they believed were less culpable for their behavior, from extreme repercussions from those actions. In time, however, the concerns of many policy makers began to shift from the traditional goals of the juvenile justice system as providing rehabilitation, to a system of punishment and deterrence. This transition was the result of dealing with what many saw as an increase in the number and severity crimes committed by juveniles.

B. The Controlling Debate: Protection of the Public v. Protection of Juveniles

Proponents for the retention and dissemination of juvenile records argue that keeping and distributing these records is necessary for public safety and the prevention of further crimes and

victims. These proponents further maintain that it is essential to public safety that employers, schools, and law enforcement agencies have access to juvenile records. The argument follows that juvenile records and the consequences that may stem from acquiring one deter crime. If there are no longer harsh consequences for juvenile arrests then the arrest's efficacy for deterring future crimes will be lost or diminished.

Conversely, advocates for limited access to juvenile records are concerned with the many negative consequences that increased access to juvenile records can have on those who have a record. In many circumstances, a record can impede a juvenile's access to employment and education, as schools often maintain the right to expel a student if a record is acquired, and employers tend to discriminate against prospective candidates for positions if they have acquired a juvenile record. These areas of discrimination, as well as other areas of discrimination against juveniles, are directly linked to the acquisition of a record. A court record is effectively a label, one which carries an extremely negative connotation. A juvenile whom is processed through the juvenile courts, regardless of the nature of the delinquent act committed, is forced to carry this label around for the rest of their life, creating a severe roadblock to the juvenile's ability to be rehabilitated and return to society at a full and productive capacity.

C. Policy and Perceptions of Public Attitude

Policy makers' perceptions of public attitudes regarding juvenile offenders and offenses have had a profound effect on the policies that have been created to administer and enforce the juvenile justice system. Policymakers often justify expenditures for juvenile justice reforms and initiatives on the basis that there exists a popular demand to be tough on crime. This is a factor which affects policies governing many controversial issues, including juvenile justice record reform. In an effort to please constituents, lawmakers are often quick to manifest what they see

as negative public sentiment into law, in an effort to please constituents. Policymakers, particularly those who are elected, are afraid to appear "weak on crime."

In recent years the perception that the public wants a harsher and more punitive juvenile justice system has been challenged. Multiple studies have been conducted in which the evidence suggests that most people are not committed to a "tough on crime" mentality when it comes to juvenile justice. Specifically, it has been found that people are willing to pay for a more rehabilitative and less punitive program for juveniles.

IV. Recommendations

1) Diversion

a) Increase focus and funding relating to diversion and consider proposing legislation, since there is currently is no legislation

2) Access to Records

a) Tiered Statutory System of Expungement:

i) For misdemeanors, automatic expungement after two years with caveat that District Attorney can object and request a hearing before a juvenile court judge

ii) For felonies, expungement by petition after two years

b) Sanctions for improper access to records regardless of willful conduct

3) Contents of the Record

a) CORI Reform

I. Concerns around gravity and quantity of offenses owing to lack of clarity must be addressed

V. Conclusion

Despite the costs, efforts, and obstacles that need to be surmounted in order to reform the Massachusetts juvenile justice system, the task is a necessity. The current system has abandoned the ideals of rehabilitation and confidentiality which the juvenile justice system was founded on, at an enormous detriment to those in the system. Leaving the juvenile records system in its current state, leaves one of the Commonwealth's most vulnerable populations even more exposed to adversity. Perhaps most importantly, this is a task which now more than ever can be achieved. Many individuals involved in the juvenile justice system have voiced support for measures which would return the juvenile justice system to its rehabilitative roots. Policymakers must take this opportunity to ensure that the future of the juvenile justice record system is not one which adversely affects juveniles but is fair and measured in its consequences.

Introduction

The first juvenile justice system was created in Illinois at the beginning of the 20th Century.[1] Though far from perfect in its implementation, the system was premised on the simple tenet that children should not be exposed to the stigma of criminality that comes with involvement in the adult justice system. This system focused on rehabilitating children instead of prescribing punishment. As part of this goal, the system called for the confidentiality of a juvenile's records.[2] However, as states throughout the union began implementing their own juvenile justice systems, the initial vision of juvenile justice developed into competing sets of policies and agendas, varying widely from state to state. Over one hundred years since the inception of the first juvenile justice system, states continue to grapple with how best to balance the rehabilitative treatment of juveniles with the need to deter and punish offenses.[3]

Currently, the law in Massachusetts states that juveniles involved in the juvenile system should be treated as children in need of aid, and not as criminals.[4] Although juveniles are to be treated in such a manner, they acquire a permanent juvenile record upon entering the system, which may have a negative impact on the rest of their lives. In Massachusetts, a juvenile's court and arrest records cannot be expunged, regardless of the severity or aptness of the charge. Instead, juveniles may only petition for their records to be sealed. The retention of these records raises the issue of whether such a system impedes the goal of rehabilitation or serves a reasonable purpose.

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[1] Christopher Gowen, Lisa Thurau & Megan Wood, The ABA's Approach to Juvenile Justice Reform, Duke Forum for Law & Social Change, 2011, at 202, available at http://dflsc.law.duke.edu/.
[2] Id.
[3] Id.
[4] Mass. Gen. Laws ch. 119 §53 (2011).

Proponents of retaining juvenile records believe that the retention of these records are necessary for public safety and the prevention of further crimes and victims. Such proponents feel that it is important that such entities as employers, schools, and law enforcement agencies have access to juvenile records. One concern is that by allowing expungement of juvenile records, individuals may no longer be deterred from committing future offenses. Thereby the expungement of records could lead to an increase in crime. Such rationale is often utilized by policy makers to advocate for more punitive juvenile justice reforms.[5]

Conversely, advocates for expungement of juvenile records are concerned with the increasing access to juvenile records and the potentially negative consequences associated with the retention of juvenile records. This record can impede a juvenile's access to education and employment. Principals may suspend or expel a juvenile for obtaining a record. Juveniles with a record are unlikely to be hired by organizations such as childcare facilities or summer camps. Advocates consider these consequences a small sampling of the negative consequences that arise from retaining juvenile records.

These differences demonstrate the tension between promoting public safety and protecting the privacy of juveniles. Reflecting the division amongst practitioners and policy makers, studies have shown that the public is at least as likely to support rehabilitative reform as punitive reform.[6] Given the legitimate concerns on both sides of this issue, thorough analysis is needed to determine if the current Massachusetts system of retaining records should be maintained or altered.

Scope of Project and Methodology

[5] Daniel S. Nagin et. al., Public Preferences for Rehabilitation versus Incarceration of Juvenile Offenders: Evidence from a Contingent Valuation Survey 2-3 (The John M. Olin Program in Law and Econ., Paper No. 28, 2006), available at http://law.bepress.com/cgi/viewcontent.cgi?article=1072&context=uvalwps.
[6] Id.

In order to address this issue of retaining records, the Massachusetts Office of the Child Advocate, a legislatively created organization dedicated to providing for the safety and protection of children involved in the welfare and juvenile justice systems, partnered with a group of first year students (hereafter the "Law Office") from Northeastern University School of Law's Legal Skills in Social Context course starting in the Fall of 2011. With direction from the Office of the Child Advocate, (hereafter the "OCA"), the Law Office has spent two semesters conducting legal and field research in order to compare Massachusetts' current treatment of juvenile records to other states' practices with the goal of providing the OCA with recommendations on how to modify Massachusetts' policy.

In order to reach this goal the Law Office examined Massachusetts' statutory policy and case law involving the treatment of juvenile records. The Law Office looked at the legislative history behind the current juvenile record statutes. The Law Office also researched statutes pertaining to juvenile record maintenance in the other forty-nine states (and the District of Columbia) and compiled a state survey. From this survey, the Law Office grouped states into families that have similar treatment of juvenile records. Out of this grouping the Law Office designated nine sample states to conduct more extensive research and provide greater comparisons to Massachusetts' treatment of juvenile records.

The Law Office supplemented this legal research by conducting interviews with stakeholders in Massachusetts and the designated sample states. The Law Office contacted stakeholders identified by the OCA, as well as stakeholders identified through preliminary research. These interviewees included juvenile advocates, members of law enforcement, and those involved in juvenile judicial court proceedings.

This report utilizes both the statutory research and field research in order to provide the OCA with possible recommendations on how to improve the treatment of juvenile records within Massachusetts. The recommendations are a product of both the research and suggestions from the stakeholders with diverse perspectives so as to provide the OCA with numerous and varied options. While the report addresses multiple reform measures, ranging in scope and feasibility, the Law Office recommends three principal reforms for improving the maintenance of juvenile records within the Commonwealth: a statewide diversion program to proactively prevent the initial creation of juvenile records, a tiered system of expungement to prevent the dissemination of records, and a simplification of juvenile CORI forms to reduce intra-system confusion and resulting consequences.

Policy Section

I. Introduction

The Supreme Judicial Court declared in Commonwealth v. Connor C. and recently reaffirmed in Commonwealth v. Eric Anderson[7]:

> [T]he provisions of the 1996 amendments did not eviscerate the longstanding principle that the treatment of children who offend our laws *are not criminal proceedings*. . . . [E]ven as to the category of children adjudicated 'youthful offenders,' the statute does not label a 'youthful offender' proceeding as 'criminal.' The distinction our law recognizes between child and adult adjudication exists partly to avoid the infringement of a child's constitutional rights, and partly to avoid the *attachment of criminal stigma to children* who may be amenable to rehabilitation. . . . The 1996 amendments did not alter that fundamental policy determination by the Legislature (*emphasis added*).[8]

The court went on to say that even "an adjudication of a juvenile as a youthful offender . . . does not transform his illegal act from an act of delinquency into a crime, and does not change the statutory obligation to treat him 'as far as practicable' as a child 'in need of aid, encouragement and guidance' rather than as a criminal"[9]

In creating and administering any system to manage the dissemination or destruction of juvenile records, while policy makers give serious consideration to the thoughts, feelings and general safety of the public at large, these concerns must be weighed against the fundamental policy articulated by the legislature and the SJC, that these youths are not criminals, rather children "amenable to rehabilitation" and "in need of our aid encouragement and guidance."

Society has established different standards for youth and children because their ability to reason has not yet fully developed. Individuals who are still developing, should not have their potential restricted and opportunities limited based on transgressions made during this

[7] Commonwealth v. Anderson, SJC-10925, 2012 Mass. LEXIS 131 at *24-31 (Mass. Sup. Jud. Ct. March 9, 2012).

[8] Commonwealth v. Connor C.,738 N.E.2d 731, 735-36 (Mass. 2000).

[9] See Id.

developmental stage. But how much leeway do we give juvenile offenders, many of whom have exhibited the potential to behave criminally and in some cases dangerously?

In essence, the debate can be summarized as competing ideas about who should shoulder the burden of juvenile transgressions. What is more important protection of the public or protection of the individual youth? To what extent must society turn a blind eye, in order to give juvenile offenders a chance to turn over a new leaf? At what point are public safety concerns important enough to limit the opportunities available to an entire class of persons?

One thing that gets lost in the debate is that there are many instances in which one can obtain a record having never actually been adjudicated for a crime. In addition to juveniles who are adjudicated delinquent, many juveniles who were never adjudicated delinquent are burdened with juvenile records that follow them into adulthood.[10] These individuals who were not adjudicated delinquent are unlikely to pose a risk to public safety since they were never found to have committed a wrongful act.

II. Historical Background: The broad overview of policies regarding confidentiality and the Juvenile Court

When the first juvenile court was established in 1899, it was based on extensive research which recognized a distinct difference in the behaviors and actions of delinquent juveniles and their adult counterparts. Early reformers, relying on new 20th century ideas of psychology, believed that children were less culpable for their conduct and more amenable to rehabilitation than adults. Central to this view, was the belief that a child's actions were driven by factors

[10] Due to case dismissal or their cases being continued without a finding subject to the completion for a period of time upon conditions and subsequently dismissed.

which were beyond their control, such as their home and family environment as well as their financial situation.[11]

Children were also viewed as being extraordinarily impulsive, immature and incapable of understanding or controlling their conduct. Even when children could distinguish between right and wrong, reformers believed that children were often unable to avoid misconduct because of other emotional pressures. Given these characteristics, it was determined that children could not form the requisite criminal intent and thus should not be subject to the policies of punishment, retribution, or deterrence, the customary responses to adult crime.[12] It was determined that youths were more malleable and should be treated as individuals in need of rehabilitation and not criminals to be punished.

Early on, confidentiality was identified as an important component of rehabilitation. Reformers hoped that confidential proceedings would protect juveniles, whom they believed were less culpable for their actions, from extreme repercussions from those actions.[13] Children needed to be protected from the stigma that generally accompanies the publicity of criminal proceedings. Reformers feared that without confidentiality, the public would brand a child as a criminal and reject him for his behavior, making a "return" to society difficult.[14]

In time, however, the concerns of many policy makers began to shift from the traditional goals of the juvenile justice system as furthering rehabilitation, to a system of punishment and deterrence. This transition was the result of dealing with what many saw as an increase in the number and severity of juvenile crimes. "Delinquents of today are committing very 'adult'

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[11] Kristen Henning, Eroding Confidentiality in Delinquency Proceedings: Should Schools and Public Housing Authorities Be Notified?, 79 N.Y.U. L. Rev. 520, 525-26 (2004).

[12] Id. at 526-27.

[13] Id. at 528.

[14] Benjamin E. Friedman, Protecting Truth: An Argument for Juvenile Rights and a Return to In Re Gault, 58 UCLA L. Rev. 165, 166 (2011).

crimes involving considerable harm to both persons and property."[15] These advocates did not necessarily disagree with the idea that juveniles are extremely impressionable to societal factors, rather that societal factors are not the only ones which need to be considered. They did not believe that the focus should be solely on the perpetrator's youthful status, but on the crimes that the youth has committed. Specific acts often signal the beginning of a socially disruptive life that maturation typically will not alter.[16]

With regard to the confidentiality policy, many people argue that this idea of maintaining strict confidentiality in the juvenile system does not take into account that negative characterizations of a juvenile are often generated by their own community. A juvenile's peers, family, and community are likely to have already determined independently to label the juvenile as "delinquent." It has been argued that the labels attached by these informal groups are far more permanent than those purportedly attached by "the system."[17] To administer a system completely around the confidentiality of proceedings, because it protects a juvenile from being unfairly judged, may be inconsequential if the juvenile has been judged and labeled by society before ever entering the justice system.

This "labeling effect," is a concern for those who advocate for limited access. Where it is conceded that juveniles are labeled by their peer groups and immediate community, it is argued that the label that comes from an official record is more detrimental. Researchers have warned of a possible "labeling" effect that may come from the official processing of juveniles.[18] A petition

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[15] See Howard N. Snyder & Melissa Sickmund, Juvenile Offenders and Victims: A National Report 113 (1995) available at https://www.ncjrs.gov/html/ojjdp/nationalreport99/toc.html. (A United States Department of Justice study found that while the adult arrest rate for murder rose a mere 9% between 1983 and 1992, the juvenile arrest rate for murder jumped 128%, and juvenile arrest rates for aggravated assault went up 100% during the same time period)

[16] Markus T. Funk, & Daniel Polsby, Distributional Consequences of Expunging Juvinile Deliquency Records: The Problem of Lemons, 52 Journal of Urb. and Contemp. L. 161, 167 (1997).

[17] Id. at 171.

[18] Anthony Petrosino, Carolyn Turpin-Petrosino & Sarah Guckenburg, Formal system processing of juveniles: Effects on delinquency Campbell Systematic Reviews, Jan. 29, 2010, at 8.

creates an official label of the child as a delinquent. This label will cause others around the child to treat him differently and in many instances in a very severe manner. This includes increased police scrutiny, which may contribute to a juvenile getting rearrested more often than juveniles who are not under the same surveillance. As previously discussed "labeling" can have many other potentially harmful impacts, including economic or educational losses.[19]

III. The Controlling Debate: Protection of the Public v. Rehabilitation of the Youth

Advocates for limited access to juvenile records are concerned with the numerous consequences that increased access to juvenile records can have on those with a record. In many circumstances a record can impede a juvenile's access to education and employment. For example, if one is seeking employment in an area involving working with children or the elderly, employment may be precluded because of a juvenile record.[20] Additionally, advocates are particularly concerned with schools' ability to expel a student if a record is acquired.[21] These are just a few examples of the negative consequences that result when a juvenile record is created and why advocates believe that access to juvenile records needs to be limited in order to fulfill the goal of allowing full rehabilitation of the young person. Conversely, proponents for the retention and dissemination of juvenile records argue that keeping and distributing these records is necessary for public safety and the prevention of further crimes and victims.[22] These

[19] Id. at 9.
[20] Lisa Thurau, Strategies for Youth, Presentation to the Law Office (Sept. 9, 2011).
[21] Henning, supra, at 524-25.
[22] Funk & Polsby supra, at 164.

proponents believe that just the threat of acquiring a record may be enough to deter delinquent behavior.[23]

In recent years, both sides of the argument have used modern science to solidify their position. Proponents for increased confidentiality often cite that the majority of studies conducted on childhood development and deviance show that anti-social behavior emerges in early childhood, and that patterns of serious and chronic criminality remain remarkably stable throughout the late teens and into adulthood.[24]

Those advocating for limiting access to juvenile records have referenced extensive studies completed in the past decade which map the brain and track its development from childhood to adulthood. Researchers have discovered that, for the most part, the areas of the brain that govern reason, impulsivity, judgment, planning for the future, foresight, and consequences are not fully developed until a person reaches their early twenties.[25] Many juvenile and law advocacy agencies have pointed to this research as evidence as to why it is unjust that juvenile records are allowed to affect an individual's ability to succeed, with consequences flowing the individual into adulthood.

In 2005 the Supreme Court acknowledged this greater understanding of the juvenile brain in their precedent setting decision in Roper v. Simmons.[26] This case prohibited sentencing juvenile offenders to death. In Roper, Justice Kennedy embraced the policies that the juvenile justice system was originally founded on. Stating that juveniles are vulnerable due to their

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[23] Id. at 185.

[24] Id. at 167.

[25] Elizabeth R Sowell, Paul M. Thompson, Kevin D. Tessner & Arthur W. Toga, Mapping continued brain growth and gray matter density reduction in dorsal frontal cortex: inverse relationships during post-adolescent brain maturation, 21 J. of Neuroscience 8819 (2001) available at http://www.jneurosci.org/content/21/22/8819.full.pdf+html; also Allan L. Reiss et. al., Brain development, gender and IQ in children, a volumetric imaging study, 119 Brain 1763 (1996) available at http://brain.oxfordjournals.org/content/119/5/1763.full.pdf+html.

[26] Roper v. Simmons, 543 U.S. 551 (2005).

"comparative lack of control over their immediate surroundings, this means that juveniles have a greater claim than adults to be forgiven for failing to escape negative influences in their whole environment."[27] Kennedy goes on to explain that "The reality that juveniles still struggle to define their identity means it is less supportable to conclude that even a heinous crime committed by a juvenile is evidence of irretrievably depraved character."[28] Most importantly, Kennedy discussed that juveniles in today's society, are viewed as "categorically less culpable than the average criminal."[29]

This policy was re-affirmed in the 2010 Supreme Court case, Graham v. Florida, in which the imposition of a life sentence without parole for a juvenile convicted of a non-homicidal offense was held to violate the Eighth Amendment's prohibition of "cruel and unusual punishment?"[30]

II. **Policy and Perceptions of Public Attitude**

Policy makers' perceptions of public attitudes regarding juvenile offenders and offenses have had a profound effect on the policies that have been created to administer and enforce the juvenile justice system. Policymakers often justify expenditures for juvenile justice reforms and initiatives on the basis that there exists a popular demand to be tough on crime. This is a factor, which affects policies governing many controversial issues, including juvenile justice record reform. Law makers are often quick to manifest what they see as negative public sentiment into law, in an effort to please constituents. Policymakers, particularly those who are elected, are afraid to appear 'weak on crime.'

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27 Id. at 570.
28 Id.
29 Id.
30 Graham v. Florida, 130 S. Ct. 2011, 2017 (2010).

Public perception shifts in response to particular well-publicized incidents. Some notable violent crimes in the 90''s led to the toughening of attitudes towards juvenile offenders.[31] In recent years, these perceptions that the public wants a harsher and more punitive juvenile justice system has been challenged. Multiple studies have been conducted which provide evidence that suggests that most people are not committed to a "tough on crime" mentality when it comes to juvenile justice.[32] Specifically it has been found that people would be willing to pay more into the system if it meant the implementation of more rehabilitative, less punitive programs for juveniles.[33] Other studies (which were more consistent with conventional polling and public opinion surveys) have found that public support for rehabilitation is considerably higher than many politicians have estimated it to be.[34]

These studies which analyze public opinion suggest that the assumed standard that the public is primarily concerned with punishing juveniles for their transgressions rather than giving offenders a second chance, is not necessarily true. The public recognizes that juvenile offenders should be treated differently than their adult counterparts.

The suggested reasons for this shift in public opinion regarding the justice system, has been explained by various reasons. The foremost being that the public has embraced the goal of the juvenile justice system: that children are individuals in need of assistance, not punishment. This is a societal trend that is not exclusive to the justice system, it is a distinction that is made in

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31 See, e.g, Commonwealth v. Edward S. O'Brien, 673 N.E.2d. 552 (1996).

32 Daniel S. Nagin et. al., Public Preferences for Rehabilitation versus Incarceration of Juvenile Offenders: Evidence from a Contingent Valuation Survey 6 (Univ. of Va. Law Sch., The John M. Olin Program in Law and Economics Working Paper Series, Paper No. 28, 2006), available at http://law.bepress.com/cgi/viewcontent.cgi?article=1072&context=uvalwps.

33 Id. at 4. (when informed that rehabilitation was as effective as incarceration, the public was willing to pay nearly 20 percent more in additional taxes annually for programs that offered rehabilitative services to serious juvenile offenders than to pay for longer periods of incarceration. This was observed for the entire sample, and in three out of four states surveyed (the exception was Louisiana).Further, these results held after controlling for several demographic characteristics associated with crime attitudes more generally.)

34 Alex R. Piquero & Laurence Steinberg, Public preferences for rehabilitation versus incarceration of juvenile offenders, 38 J. of Crim. Just. 1 (2010).

many areas of public policy. Children traditionally are protected from entering into contracts, acquiring debts, or being sued. Society has embraced this idea that there is a greater need to protect juvenile offenders. Society has come to understand, and policy reflects that, children's brains are not fully formed hindering their ability to fully reason, plan, exercise good judgment, etc.[35]

At this point, it is important to note that public perception of particular policy areas are easily manipulated by outside forces, specifically the news media. People are often misled to believe that a particular position is incredibly popular or unpopular by how often, and in what light, an issue is portrayed. Where public sentiment can be seen currently as advocating for rehabilitation and the protection of juvenile offenders from collateral consequences of records, it could change very quickly if the news media began to spend more time discussing violent juvenile offenders. This may lead people to believe that more juveniles are committing crimes, that the crimes committed are more serious, or a dangerous mixture of both. This may severely impede any efforts to reform the juvenile justice system.

IV. Conclusion

Despite the costs, efforts and obstacles that need to be surmounted in order to reform the system, the task has become a necessity. The current system has abandoned the ideals of rehabilitation and confidentiality which the juvenile justice system was founded on, at an enormous detriment to those in the system. Leaving the juvenile records system in its current state, leaves one of the Commonwealth's most vulnerable populations even more open to adversity. Perhaps most importantly, this is a task which now more than ever can be achievable. The general public has voiced support for measures which would return the juvenile justice

[35] Id. at 3.

system to its rehabilitative roots. Policymakers must take this opportunity to ensure that the future of the juvenile justice record system is not one which adversely affects juveniles but is fair and reasonably measured in its consequences.

Massachusetts Research

I. MASSACHUSETTS LAW

Juvenile Justice System: Background

Similar to the other states, Massachusetts has statutes that define and sanction offenses committed by juveniles.[36] This statutory scheme emphasizes that the juvenile justice system should treat children appearing before the court as a parent would, as children in need of aid, encouragement and guidance, and not as criminals.[37] For this reason, juveniles are tried in specialized juvenile courts where the proceedings are closed to the public and confidential with certain exceptions.

However, as is the case with the adult justice system, not all offenses committed by juveniles are treated the same; juveniles face divergent paths depending upon the severity of their offenses. Juveniles may be adjudicated as either "delinquent" or "youthful offender." In the alternative, a juvenile may also receive a continuance without a finding. The vast majority of juveniles appearing before the court are charged as delinquents, a number totaling 8,207 in 2011.[38] A "delinquent" is a juvenile between the age of seven and seventeen who violates any ordinance, by-law, or law of the Commonwealth.[39]

However, many juveniles, who are frequently first-time offenders, will receive a continuance without a finding. This disposition does not constitute an adjudication of delinquency. Instead, the case is continued, with the consent of the juvenile and at least one

[36] Mass. Gen. Laws ch. 119, §§ 52-74 (2011).
[37] Mass. Gen. Laws ch. 119, § 53 (2011).
[38] Fiscal Year 2011 Statistics for the Juvenile Court Department, Admin. Office of the Trial Court, http://www.mass.gov/courts/courtsandjudges/courts/juvenilecourt/2011stats.html, (last updated Nov. 8, 2011).
[39] Mass. Gen. Laws ch. 119, § 52 (2011).

parent or guardian, for a specified period of time on certain conditions, under probation supervision.[40]

Alternatively, after an admission of sufficient facts or after trial, the juvenile may be found delinquent. This disposition constitutes an adjudication of delinquency.[41] Following an adjudication of delinquency, the juvenile may be placed on probation for a period of time or committed to the Department of Youth Services until the age of eighteen.[42]

A small number of juveniles between the ages of fourteen and seventeen are classified as "youthful offenders" due to the gravity of their offense, and may be subjected to adult punishments as a result.[43] There were only 274 youthful offender indictments in 2011 compared with 20,084 delinquency complaints. Furthermore, these indictments related to only 131 juveniles.[44] The decision of whether to charge a juvenile as a delinquent or as a youthful offender rests with the district attorney. This classification arose from the "Youthful Offender Act",[45] which replaced the previous transfer hearing process.[46] The Act was designed to "give prosecutors greater discretion when proceeding against violent juvenile offenders, and to reduce or eliminate protections previously afforded delinquent children."[47]

At the beginning of a juvenile's court proceedings, she still faces a variety of different outcomes depending on the status she is assigned per her charge. If the juvenile is adjudicated delinquent, the court may order her to be placed in the care of a probation officer, or commit her

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[40] Mass. Gen. Laws. ch. 119, § 58 (2011).
[41] Id.
[42] Id.
[43] Mass. Gen. Laws. ch. 119, § 52 (2011).
[44] Fiscal Year 2011 Statistics for the Juvenile Court Department, Admin. Office of the Trial Court, http://www.mass.gov/courts/courtsandjudges/courts/juvenilecourt/2011stats.html, (last updated Nov. 8, 2011).
[45] Act of July 27, 1996, ch. 200, 1996 Mass. Acts 908.
[46] Prior to 1996, juveniles committing serious offenses could be transferred to the adult criminal court and tried as adults. The Youthful Offender Act created a new category of offenders that would allow juveniles committing more serious offenses to receive more punitive sentencing but prevent their adjudications from being classified as "crimes."
[47] Commonwealth v. Dale D., 730 N.E.2d 278, 281 (2001).

to the custody of DYS.[48] Regardless of the order, the duration of the commitment, or the probationary period, must cease before the juvenile reaches majority.[49] However, even if a juvenile is not adjudicated delinquent, this may not necessarily be the end of her involvement with the court system. For example, with the consent of the juvenile and at least one parent or guardian, the juvenile can be placed on probation even if there is no finding of delinquency.[50]

The small number[51] of juvenile's adjudicated youthful offenders will face more substantial penalties. If the juvenile is indicted and adjudicated as a youthful offender, the court has several sentencing options at its disposal. These youthful offenders may be committed to the Department of Youth Services until the age of twenty-one or given any sentence that may be imposed on an adult for the offense committed. Also, they may be given a combination of adult and juvenile sentences. However, this combination sentence may not exceed the statutory maximum provided for adults.[52] In addition, an adjudication as a youthful offender will not be characterized as a crime, but rather as an act of delinquency.[53] In determining which of these three sentencing options to impose, the court considers the nature and seriousness of the crime, statements from the victims, probation reports, past court delinquency records, the juvenile's age and maturity, and her potential for involvement in future criminal conduct.[54] There does not appear to be a mandated process for challenging the classification of youthful offender.[55]

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[48] Mass. Gen. Laws ch. 119 § 58 (2011).
[49] Id.
[50] Id.; this appears to be aimed at avoiding a negative adjudication in exchange for the completion of a community service requirement.
[51] In Massachusetts during 2011 there were 131 individuals indicted as youthful offenders compared with 8,207 indicted as juvenile delinquents. Fiscal Year 2011 Statistics for the Juvenile Court Department, Admin. Office of the Trial Court, http://www.mass.gov/courts/courtsandjudges/courts/juvenilecourt/2011stats.html, (last updated Nov. 8, 2011).
[52] Mass. Gen. Laws ch. 119 § 58 (2011).
[53] Commonwealth v. Anderson, SJC-10925, 2012 Mass. LEXIS 131 at *24-31 (Mass. Sup. Jud. Ct. March 9, 2012).
[54] Mass. Gen. Laws ch. 119 § 58 (2011).
[55] However, Massachusetts law dictates that reasonable efforts must be made to keep the child at home with his parents, but, due to the delinquency, the court may conclude that the home environment does not serve the child's best interests. Id.

Confidentiality of Juvenile Records

All records of a youthful offender proceeding held pursuant to an indictment are open to public inspection in the same manner and extent as adult criminal records.[56] With the exception of youthful offender records, all other records that arise as a result of the juvenile court process are withheld from public inspection, unless the court gives its consent.[57] Confidentiality can become a problem with electronic records, which, for various reasons, can make it more difficult to track who is accessing or distributing the files. However, certain information is available to the public. Section 60A of Chapter 119 of Mass. Gen. Laws stipulates that the probation officer[58] can disclose the name of a child involved in a delinquency case if the child is between the age of fourteen and seventeen, has been adjudicated delinquent on at least two prior occasions for acts which would have been punishable by imprisonment were the child seventeen or older, and is charged with delinquency by conduct which would be punishable by imprisonment in state prison if the child were seventeen or older.[59]

Although the Massachusetts legislature protects the confidentiality of juvenile records from the general public, records are available to numerous organizations. These organizations include schools where the juvenile is currently registered, future employers, local law enforcement agents, social services personnel, the armed forces, and the judiciary. As mentioned earlier because most records are stored electronically they can potentially be forwarded to agencies that are not included on this list. One way to mitigate the improper distribution of these juvenile files could be to implement sanctions for those who release or obtain them illegally.

[56] Mass. Gen. Laws ch. 119, § 60A (2011).
[57] Id.
[58] Mass. Gen. Laws ch. 119, § 57 (2011). This section states that a probation officer must be assigned to investigate every case of a delinquent child.
[59] Mass. Gen. Laws ch. 119, § 60A (2011).

Information Available in the Record

A Juvenile record is typically kept electronically. The record will always include the juvenile's name and address. In addition, it may also contain detailed reports of the incident and the final outcome of the delinquency case. This record does not disappear when the juvenile reaches the age of majority.[60] Any juvenile record that was accessible while the individual was a child continues to be available once she becomes an adult. Juvenile records are not sealed unless the individual petitions the Commissioner of Probation for them to be sealed. [61]

Sealing of Juvenile Records.

Section 100B

The current Massachusetts statute controlling the treatment and sealing of juvenile records is Section 100B of Chapter 119 of Mass. Gen. Laws. Under this statute, any person who has been the subject of a delinquency court proceeding and who has a record on file with the Office of the Commissioner of Probation can petition the Commissioner to have the record sealed.[62] The petitioner must complete a form provided by the Commissioner.

Any sealing request must satisfy three conditions. First, for records to be sealed, the juvenile's appearance or disposition must have occurred three years prior to the request. Second, the petitioner must not have "been adjudicated delinquent or found guilty of any criminal offense" in Massachusetts during those three years.[63] Motor vehicle offenses with penalties of fifty dollars or less, however, will not prevent a record from being sealed. The third requirement is that during the same three year period preceding the request, the petitioner has not "been

[60] Id.; It is a common misconception that juvenile records go away once the juvenile becomes an adult.
[61] Mass. Gen. Laws ch. 276, § 100B (2011).
[62] The commissioner of probation oversees and supervises the probation service. Mass. Gen. Laws ch. 276 § 98 (2011).
[63] Mass. Gen. Laws ch. 276, § 100B (2011).

imprisoned or committed as a delinquent."[64] Finally, the form for sealing the files must include a signed statement that he has not been "adjudicated delinquent or found guilty of any criminal offense in any other state, United States possession, or in a court of federal jurisdiction… and has not been imprisoned under sentence in any state or country within the past three years."[65] Motor vehicle offenses with penalties of fifty dollars or less are, again, not a criminal offense that would prevent the record from being sealed. So long as these conditions are met, the Commissioner "shall seal such file."[66]

Following a successful petition to seal a juvenile record, the Commissioner of Probation seals the petitioner's delinquency appearances and delinquency dispositions in his files first. Then she must inform all other officials and offices that keep these records of the sealing. These include the courts where the adjudications occurred, the offices where records were filed, and the Department of Youth Services. Upon receiving notification, these departments shall also seal their records.[67] Once a juvenile record is sealed, the individual will not be prohibited from working for the Massachusetts government.[68] Furthermore, sealed records are not admissible in evidence and can only be used when a commissioner imposes a sentence for a later juvenile or adult criminal offense.[69]

If a police officer or officer of the court asks about a sealed record, the Commissioner will reply that there is a "sealed delinquency record over three years old." Every other authorized person, such as those listed in the previous section, will be told that no record exists.

[64] Id.
[65] Id.
[66] Id.
[67] Id.
[68] Id.
[69] Id.

After a record has been sealed, if the individual is adjudicated delinquent or is found guilty of a criminal offense, the information in the sealed record can be accessed by a judge or probation officer, but the sealed information will be used only in sentencing.[70]

The Impact of Technology on Section 100B

Section 100B of Chapter 276 of Mass. Gen. Laws was passed during an era before Massachusetts juvenile records were computerized. In the modern era, technology makes the ability to seal juvenile records much more difficult than it was in 1972. Electronic information is considerably easier to distribute and access than paper records. Also, electronic databases are quicker and easier to search than courthouses' many files of paper documents. Once an order to seal a record is received it can be nearly impossible to track down and seal all of the copies that have been made from electronic records. Paper records only required notice to be sent to the limited number of offices where the copies of juvenile records were kept. Thus, sealing paper records may be more reliable than sealing electronic records.

With the advancement of technology and computers, there has been an increase in private organization and individuals who are able to conduct inexpensive background checks. If a company that does background checks manages to get a hold of a juvenile record it can be impossible to prevent them from distributing them once a sealing order is granted. These outside companies are beyond the state's jurisdiction and therefore cannot be required to destroy the records. In addition, once a document is released on the internet it can be virtually impossible to track down and completely delete. An internet search could still show that a record did exist at one time, thus making the process of sealing ineffective.

II. LEGISLATIVE HISTORY: Putting Section 100B in Perspective

[70] Id.

Massachusetts legislation proposing changes in the regulation of juvenile records and specifying who has access to them, and under what conditions, is marked by three phases. During the first phase, beginning in the early 1970's, the Legislature particularly focused on providing privacy and restricting access to juvenile records. The second phase, starting in 1978, focused on decreasing the confidentiality of juvenile records by allowing greater public access to juvenile record information. Then in 2003, the third and current phase began, moving back towards a higher degree of confidentiality for juvenile records.

Phase I: Introducing 100B 1972-1978

In 1972 the Massachusetts General Court passed House Bill 3829, codified as Section 100B of Chapter 276 of Mass. Gen. Laws which permits the sealing of juvenile records. This bill is characteristic of the first phases' movement towards restricting access to juvenile records and punishing the disclosure of those records.

Though Section 100B of Chapter 276 of Mass. Gen. Laws created a statutory scheme for the sealing of juvenile records, a push for further reform continued in the legislature. Every year between 1972 and 1977, with the exception of 1976, bills calling for stricter sealing or expunging juvenile records were filed. These proposals ranged from the automatic expungement of the record once the juvenile reaches the age of eighteen to allowing records to be expunged only if certain requirements were met. An example of such a set of requirements was (a) the juvenile reached the age of eighteen (b) the complaint against the juvenile was dismissed, (c) the juvenile was not adjudicated delinquent, or, if the juvenile was adjudicated delinquent but for a non-felony crime, and (d) no further proceedings had been filed in the preceding year.

During this phase there were also attempts to ensure the careful handling of juvenile records and their protection from the public. These proposals included creating fines up to $500

or making it punishment of up to two years in a house of correction for the non-authorized disclosure of juvenile records.

At the close of this period, the Massachusetts Supreme Court held in Police Commissioner of Boston v. Municipal Court of Dorchester District[71] that juvenile judges may expunge or seal juvenile police records at their discretion. In this case a juvenile was charged with assault. When the alleged victim failed to appear, the trial judge ordered the Boston Police to purge their arrest records, including the defendant's fingerprints and mug shots.[72] The Supreme Judicial Court held that trial judges have ancillary powers over juvenile records, which they may use in their discretion to protect juveniles from the collateral consequences of an arrest record. This benchmark case held that trial court judges may order police departments to destroy a juvenile records if the court concludes that its maintenance no longer serves any valid law enforcement purpose.

Beyond Section 100B: Phase II 1978 – 2002

Following the judicial decision in Police Commissioner there was a legislative shift towards increasing public access to juvenile records. After 1978, the Legislature would not see another juvenile expungement or sealing bill until 2003.[73] Four types of bills characterized the second phase's push to decrease the confidentiality of juvenile records. The first set of proposed bills authorized publishing the names of juveniles upon a second adjudication as a delinquent. One of these bills became law in 1985.[74] This particular law allowed the juvenile's name to be

[71] Police Comm'r of Boston v. Mun. Court of Dorchester Dist., 374 N.E.2d 272 (Mass. 1978).
[72] Police Comm'r, 374 N.E.2d at 274.
[73] See Legislative History in Appendix.
[74] See Legislative History in Appendix.

publicized if she had been previously adjudicated delinquent twice for acts that, if committed by an individual seventeen or older, would have been punishable by imprisonment in state prison.[75]

The second frequently filed bill allowed the release of a juvenile's name, identifying information, and the nature of the offenses on record if the juvenile was adjudicated delinquent for an offense which, if committed by an adult, would be punishable by imprisonment in state prison.[76]

The third common type of proposed bill granted public access to a juvenile's records if the case met certain prerequisite conditions, such as the juvenile committing a serious offense. One of these provisions was passed in 1996.[77] This provision created the category of youthful offender and allowed public access to records of those juveniles classified as youthful offenders.[78]

The fourth set of bills, if passed, would have repealed Section 60A of Chapter 119 of Mass. Gen. Laws in its entirety.[79] This would have effectively removed any confidentiality protections for juvenile records. No bill in this category was ever enacted.

This legislative call for decreased confidentiality in this phase was echoed by the Supreme Judicial Court in Commonwealth v. Gavin G.[80], which effectively eliminated the judicial authority to expunge records created by the Court's earlier holding in Police Commissioner. Whereas Police Commissioner dealt with juvenile arrest records, Gavin G. addressed expungement of juvenile probation records.

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[75] S.B. 686, 174th Gen. Court (Mass. 1985).
[76] H.B. 2031, 173rd Gen. Court (Mass. 1983).
[77] Act of July 27, 1996, ch. 200, 1996 Mass. Acts 908.
[78] Id. A youthful offender is a juvenile age fourteen to seventeen subject to adult punishment due to the gravity of his or her crime.
[79] H.B. 396, 173rd Gen. Court (Mass. 1983).
[80] Commonwealth v. Gavin G., 772 N.E.2d 1067 (Mass. 2002).

Gavin G. involved a juvenile whose delinquency charges were dismissed. The juvenile then petitioned to have both his court and police records expunged. The Commissioner of Probation opposed the petition, arguing that the trial judge had no authority to expunge the juvenile's probation records. Despite the Commissioner's objections, the trial judge ordered all records expunged.[81] On appeal to the Supreme Judicial Court, the juvenile court ruling was reversed. The majority in Gavin G. distinguished the case from the holding in Police Commissioner, reasoning that legislative remedies existed for the protection of probation records, as opposed to the police records at issue in Police Commissioner, which were without legislatively prescribed protections.[82] Juveniles are allowed to request that their records be sealed so long as certain requirements are satisfied[83]. The Gavin G. court held that because access to juvenile records was limited and a juvenile could request records to be sealed after three years assuming all requisites have been met adequate legislative remedies existed and thus, juvenile courts lacked the authority to issue an expungement order.[84]

Current Policies: Phase III: 2003 - Present

In response to Gavin G.,[85] the third phase of legislation is a renewal of the push to allow the expungement of juvenile records, along with a continued, but more limited contradictory effort to expand access to records. Beginning in 2003, bills authorizing expungement of juvenile records have been offered in every legislative session. Some bills have called for expungement by petition while others have suggested automatic expungement for charges that are dismissed or withdrawn. Simultaneously, there has been a concurrent movement to expand access to juvenile records for the public and for entities providing services to children, such as schools.

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[81] Gavin G., 772 N.E.2d at 1069.
[82] Gavin G., 772 N.E.2d at 1069-1070.
[83] Mass. Gen. Laws ch. 276, § 100B (2001).; See above discussion.
[84] Gavin G., 772 N.E.2d at 1071.
[85] Id.

The most recent push for expungement is embodied in H.B. 1298, which, as of January 2012, was pending before the Massachusetts Joint Committee on the Judiciary. H.B. 1298 would allow a juvenile to petition to have all law enforcement, court and probation records expunged as soon as juvenile proceedings or dispositions are completed. Under H.B. 1298, if the juvenile has been exonerated, the case has been dismissed with prejudice, or if the charges have been dismissed for lack of evidence, the records should be expunged, unless the Commonwealth provides evidence to the contrary. H.B. 1298 also requires the court to provide a sample petition to juveniles and to inform them of their right to petition for expungement and sealing.

Legislative-Judicial Tension

While the legislature has renewed its push for expungement, the Supreme Judicial Court has held firm to the tenets of Gavin G. The absence of any judicial authority to expunge juvenile records was reaffirmed by the recent holding in Commonwealth v. Boe.[86] The case involved a juvenile who had been mistakenly identified and charged as the perpetrator of a crime. The district attorney recognized the mistake, and, working in conjunction with the juvenile, filed a motion to expunge the records. The Commissioner of Probation objected to the motion on various grounds, namely that the trial judge lacked authority to grant an expungement. However, upon a hearing, the judge ordered the juvenile's probation records expunged. On appeal, the Supreme Judicial Court reaffirmed Gavin G. holding that juvenile judges lack the authority to order juvenile records expunged. Together with Gavin G., Boe poses a substantial obstacle to expungement unless and until there is a statutory amendment.

III. MASSACHUSETTS FIELD RESEARCH

[86] Commonwealth v. Boe, 924 N.E.2d 239 (Mass. 2010).

Themes

The Law Office's research on the treatment of juvenile records in Massachusetts included interviews with a number of people involved in, or having special knowledge of, juvenile proceedings and the treatment of juvenile records in the Commonwealth. The interviewees included law enforcement professionals, advocates for juveniles, juvenile court personnel, and others with a particular interest in the juvenile justice system. While the interviewees worked in a variety of capacities, a core set of topics emerged in multiple interviews.

One common thread that emerged from these interviews was the public's overall lack of knowledge regarding juvenile records. According to these interviewees, both juveniles and adults have fundamental misconceptions about how juvenile records are treated in Massachusetts and how the law requires that they be handled. Many adults and juveniles mistakenly believe that juvenile records disappear once the juvenile becomes an adult.[87] In light of this misconception, several interviewees highlighted the importance of informing adults and juveniles about the consequences of having a juvenile record.

A second theme mentioned in several interviews was the impact of technology on recordkeeping. Data mining – the electronic retrieval, management, and dispersal of juvenile records—was a topic of specific concern.

A third theme emphasized by these interviewees observed a general shift away from a "tough-on-crime" mentality and a return to a focus on rehabilitation. Interviewees who discussed this shift mentioned that there now appears to be a concern with the rehabilitation of children as opposed to punishing them by maintaining records of their youthful mistakes. This shift could lead to alternative methods for the creation and maintenance of juvenile records.

[87] Interview M9 (Jan. 6, 2012).

While there is a movement to rehabilitate children and keep juvenile records private, it is balanced against the right of the public to have information regarding juvenile records for safety reasons. Addressing this public safety concern, some interviewees noted a common misconception that expungement of juvenile records will lead to an increase in crime. These interviewees emphasized that there is no empirical data to suggest that the expungement of juvenile records will lead to an increase in crime.

Some interviewees discussed the collateral consequences of having a juvenile record. Juvenile records may impede juveniles' opportunities in both education and employment, and deny their families eligibility for public housing. Once a juvenile living in government assisted housing gains a record, the entire families' housing can be revoked if the child continues living in the home.[88] Furthermore, interviewees mentioned juvenile records may preclude juveniles from getting jobs. However, a couple of the interviewees thought that system was working well.

Another topic that was mentioned throughout these interviews was whether the current process for handling juvenile records impacted certain subgroups of juveniles more adversely than others. A few interviewees mentioned that the current juvenile record system impacts underprivileged youth disproportionately. They discussed that young people who are unable to afford a lawyer are at a disadvantage when handling their records. Conversely, another interviewee felt that there was no group of juveniles more adversely impacted by the juvenile record system than another.

When discussing Massachusetts' current treatment of juvenile records, some interviewees felt that the laws in place functioned well while others, particularly those who advocate on behalf of children, mentioned a need for reform when handling juvenile records. A couple interviewees compared Massachusetts with other states when discussing how juvenile records should be

[88] Lisa Thurau, Strategies for Youth, Presentation to the Law Office (Sept. 9, 2011).

handled. They mentioned that several other states have better approaches to treating juvenile records. One comparison made was that in Massachusetts a person can only be adjudicated as a juvenile until the age of seventeen while other states have extend the adjudication age to eighteen.

One final interesting theme discussed in the interviews was FBI involvement in collecting juvenile arrest records. When a juvenile is arrested and fingerprints are taken, the FBI then gets a record of these fingerprints. Those fingerprints consequently remain accessible to the police and would not be impacted by the sealing or expungement of such records.[89]

Concerns

In addition to the themes mentioned above certain reoccurring concerns surfaced throughout the interviews. Most prevalent was the concern that juvenile records are too easily accessible. Several interviewees shared their worries about who is obtaining juvenile records and what information is being provided. Interviewees also expressed the concern that even though sealing of records is an option, there are still instances where the sealed arrest record is accessible. For example, when someone is arrested, the arrest records are sent directly to the FBI, which does not recognize sealing. As a result, a person's sealed arrest record is still accessible through fingerprint checks.

Another concern regarding the dissemination of juvenile records involves school principals' access to juvenile records. Currently, there is no uniform system for police departments to notify principals about juvenile charges and adjudications. As a result, there are significant variations in the degree of access schools have to juvenile records.

[89] Interview M3 (January 3, 2012)

Several interviewees told the Law Office that the actual juvenile records are difficult to understand given that there can be multiple docket numbers for the same offense. The result is that these juveniles appear to have more serious or lengthy records than they actually do. A few of the interviewees believe that some of these records should not be created in the first place. Furthermore, they discussed the need for alternative approaches such as diversion programs that could prevent records from being created so easily.

Certain interviewees also expressed alarm over the general lack of knowledge regarding juvenile records. Some desired more training to educate juveniles about options for sealing. Other interviewees mentioned adults' misconceptions about the treatment of juvenile records. Many juveniles and adults mistakenly believe that juvenile records disappear once the juvenile turns eighteen.[90]

Some interviewees were concerned about the socioeconomic disparities between the juvenile court population and the public at large. They discussed how some juveniles involved in the justice system tend to be underprivileged young people without much financial support. Having the financial means to hire an attorney gives any juvenile a greater chance of navigating the legal system successfully. Those without financial means are at a disadvantage in their efforts to ensure that their records are properly handled.

Finally, several interviewees expressed concern that the juvenile record system is not functioning as intended. The juvenile justice system was founded to rehabilitate troubled children.[91] Several interviewees stated that the current system has lost its focus on rehabilitation. A few interviewees mentioned that since adolescents are still developing both cognitively and emotionally, they have great potential to change for the better.

[90] Interview M9 (Jan. 6, 2012).
[91] Christopher Gowen, Lisa Thurau & Megan Wood, The ABA's Approach to Juvenile Justice Reform, Duke Forum for Law & Soc. Change, 2011, at 188, available at http://dflsc.law.duke.edu/.

Field Research Recommendations

One of the purposes for interviewing a variety of experts with differing perspectives was to ask them what they thought an ideal treatment of juvenile records would be and why it would be ideal. In particular, interviewees were asked for their thoughts on expungement and sealing. Which would be more effective in meeting the goals of record keeping? What are the advantages and disadvantages of each? Also, how should any recommended changes be implemented? Interviewees were also asked what indicators they might suggest to measure success and what challenges they might face in attempting to implement the ideal systems.

1. Diversion

One advocate stressed alternatives to prosecution – namely, diversion programs. Diversion programs give juveniles the option to participate in a rehabilitation program as an alternative to entering the juvenile justice system, which triggers the creation of a record. Diversion programs implemented in other states often require participation in education, restitution, or completion of community service in return for not prosecuting the case. A diversion program, in which a juvenile record is never created, can help improve the chance of rehabilitation for juveniles.[92] The approach offered by diversion programs follows the traditional intent of the juvenile courts, which is to rehabilitate and nurture the juvenile. Another benefit of diversion programs is that they often cost less than adjudication and probation.[93]

2. Expungement

There was a wide range of views amongst the interviewees regarding the topic of expungement. Interviewees involved in advocacy work, as well as several judges, supported the expungement of juvenile records. At one end of the spectrum was the idea that expungement

[92] Randall G. Sheldon, Detetention Diversion Advocacy: An Overview, Juv. Just. Bull. (Office of Juvenile Justice and Deliquency Prevention,), Sept. 1999, available at https://www.ncjrs.gov/html/ojjdp/9909-3/contents.html.
[93] Cape and Islands Dist. Attorney's Office, Juvenile Diversion, http://www.mass.gov/da/cape/juvdiv.htm (last visited Mar. 10, 2012).

should be automatic at eighteen and that juvenile records should not be accessible to anyone. One judge felt that the nature of the crime should not be a factor in determining whether to expunge a juvenile record. At the other end of the spectrum was that idea that juvenile records should never be expunged. Still other interviewees had a more moderate approach and supported expungement with some exceptions, depending upon the nature of the offense.

There was a general agreement, however, that expungement may not be politically feasible. Interviewees discussed how politicians often fear being seen as "soft on crime" and how any new juvenile crime story could derail a move toward expungement. Several interviewees mentioned that the Probation Department and law enforcement would oppose expungement by saying that they need access to juvenile records in order to carry out their duties of protecting the public and serving probationers.

Additionally, some interviewees expressed the concern that expungement may not be a practical solution. One interviewee described the Massachusetts juvenile justice system as many disconnected departments working together. Finding all the locations where juvenile records are kept and eliminating them completely would be no small task. An interviewee involved with adult records mentioned that even if expungement were the law in Massachusetts, the juvenile's records would still be retained by the FBI, which is not bound by Massachusetts law.

3. Sealing

The other common method for maintaining juvenile records in a confidential manner is sealing. As explained above, Massachusetts allows juveniles who have met certain criteria to petition for the expungement of their records three years after the termination of juvenile proceedings. An interviewee involved with adult record maintenance felt that this was a good system. Other interviewees, on the other hand, expressed disappointment that sealing is not

automatic, especially in cases where the juvenile is found to be innocent or has been erroneously charged.[94] In these instances, the interviewees felt sealing should be automatic without a waiting period.

Other Options

Some interviewees expressed the concern that under the current law too many individuals and entities have access to juvenile records. One interviewee noted an ongoing movement advocating for expanded access to sealed records, which would limit the effectiveness of the sealing process. One interviewee mentioned that in recent years there has been an expansion in access to sealed records.[95]

Other interviewees felt that school access to juvenile records should be either restricted or handled differently. By law, school principals may suspend or expel students based on their juvenile records.[96] Several interviewees explained that there is no uniform system in place to govern principals' access to these records. An interviewee felt that a uniform system would help to ensure that principals have the information they need to run their schools safely.[97]

Another interviewee felt, however, that principals have too much access to juvenile records. In one city, probation officers are assigned to schools and have regular meetings in which they inform the principals of their students' juvenile records. According to this interviewee, these meetings are inappropriate and potentially harmful to the juvenile. This interviewee argued that such relationships between probation officers and principals should not exist.

[94] Interview M10 (January 6, 2012).
[95] Interview M3 (January 4, 2012).
[96] Mass. Gen. Laws ch. 71 § 37H1/2.
[97] Interview M3 (January 4, 2012).

These field interviews revealed system-wide themes and greatly helped us to understand the practical applications of current Massachusetts law. Concerns regarding the current system were expressed and recommendations for changes in juvenile record maintenance were made. While there was no consensus among the interviewees as to how effective or ineffective the current juvenile records system is, the majority of these interviewees did provide suggestions as to how the system could be improved.

Common Themes in the Fifty State Survey

In compiling this survey on juvenile record maintenance common themes began to emerge amongst the practices of the fifty states. Outlined below are the regulatory procedures that appeared in a majority of the states' juvenile record statutes. Each theme has been defined and the reasons for its inclusion have been outlined. In some cases, certain themes have subcategories explaining the variations in how different states applied them.

I. Automatic Expunging and Sealing

Many states allow for either the automatic expungement or automatic sealing of records. In some states, sealing and expungement are performed automatically by the court with no delay. However, in most states the juvenile must reach a set age requirement or wait a pre-determined period of time before a crime can be automatically expunged or sealed. The most common age requirement is for the juvenile to be twenty-one or older. Also, it is common for more severe crimes to be prohibited from being expunged or sealed at any time.

One form of record treatment utilized by states is to have juvenile records automatically expunged either immediately. Typically, expungement of records is allowed only for juveniles whose case was dismissed or who were adjudicated not delinquent. There are also statutes that grant automatic expungement or sealing to juveniles on the condition that they enter and successfully complete a diversion program.

Finally, in many of the states permitting automatic expungement or sealing a record may not be expunged or sealed if the juvenile was adjudicated delinquent for an offense that would be a felony if committed by an adult. Such offenses include murder, arson, sexual assault, or aggravated assault with a weapon.

II. Sealing or Expungement by Petition

The most common procedure amongst the states is to permit juveniles to petition for either sealing or expungement, depending on the state. The petition method specifies that a juvenile may file a petition to have his record sealed or expunged upon fulfilling certain statutory qualifications. These qualifications typically include a set age requirement similar to that for automatic sealing and expungement.

Typically, under the petition method, when a juvenile reaches the age requirement (often the age of majority in the state), or a certain time period has elapsed since the completion of the court proceedings, the juvenile may then file a motion with the court. This step usually requires a lawyer to assist in filing the motion. A few states such as California and Connecticut allow public defenders to aid in this process. There are also states in which the court has the discretion to expunge or seal the juvenile's record on its own motion without requireing a petition from the juvenile.

After the motion or petition has been has been filed and reviewed by a judge, there are several procedural variations that the petition method can then follow. In many states, the prosecutor's office will be notified of the motion to seal or expunge. Typically, if there are no objections from that office, the motion will be granted without a hearing. If there are objections, then it is common for a hearing to be held. In other states, a hearing is not part of the petition process, and the juvenile offender must only submit a standard petition form, which may be obtained from the courthouse or another municipal building. The judge has authority to grant or deny the motion. There are several factors the judge takes into account in determining whether to grant or deny the motion, including the juvenile's behavior following the adjudication. Other considerations include whether the juvenile has been subject to further adjudications, whether the

juvenile has been rehabilitated, whether the juvenile has completed any required community service, restitution, diversion, etc., and whether are there any cases currently pending against the juvenile. Should the judge find that the juvenile has met the requirements specified in the statute, the motion will be granted.

At this point in the petition process, many states will send a notice of the order to seal or expunge to other state organizations that have copies of the record. The organizations are also notified that they are no longer able to disseminate the information and that they should respond to any inquiries by stating that there is no longer a record.

III. The Exclusion of Certain Crimes

In most state there are certain crimes that have been statutorily excluded from the expungement and sealing process. These exceptions vary in scope, with some states excluding only a narrow set of severe crimes, while others have an extensive list of excluded crimes that are ineligible for sealing or expungement.

Despite this variation, most legislation addresses the same core categories of criminal activities. A charge of murder, in addition to sex crimes, is exempt in almost all sealing and expungement statutes. Other common core crimes exempt from expungement or sealing include arson and crimes that would be considered a felony if committed by an adult.

It should be noted that amongst these crimes, there is some discrepancy in what does and does not exempt a juvenile from having her record sealed or expunged. For example, in some states all degrees of a murder charge are exempted from expungement or sealing, while in other states only first and second-degree murder offenses are excluded.

Similarly, while the majority of states exempt most forms of sexual crimes from expungement or sealing statutes, the specific charge of sex crime exempted varies significantly.

In a few states any sexual crime excludes the juvenile from expungement or sealing. Other states expressly specify that sexual assaults and rape exclude a juvenile from having her record expunged or sealed.

IV. Tier System

A common theme amongst the states is to specify different sealing or expungement procedures based on the type of record and call for different dissemination procedures of the records based on the juvenile's age and the severity of the crime committed.

The most common type of tier system allows for different sealing or expungement procedures based on either the crime committed or the process the juvenile went through. For example, if the juvenile committed an offense that would be a felony or a serious misdemeanor if committed by an adult, the juvenile may not be able to seal or expunge her record. Alternatively, the juvenile may have to wait a longer time period before she can petition for sealing or expungement.

Another tier system calls for different procedures depending on the process the juvenile went through. For example, if the juvenile was enrolled in and successfully completed a diversion program, the record can typically be expunged in a short time. If the juvenile record was never sent to the prosecutor's office, the juvenile was never adjudicated, or was adjudicated not delinquent, there may also be a shorter waiting period before the record can be sealed or expunged. Finally, if a juvenile was adjudicated delinquent, she will typically have to wait the full time period required in the statute before filing for sealing or expungement.

The final tier system allows for different levels of dissemination of the records based on the juvenile's age and severity of offense. In many states, the confidentiality of records for juveniles under fourteen is more stringent than for those over the age of fourteen. The nature of the offense

is also a substantial factor in the degree to which the public may access the record. In many state statutes, the records are made public and open to the media if a juvenile commits a violent felony or sexual offense, whereas the record is better protected from exposure to the general public if the offense is less serious.

V. Time Periods

Time periods are a very common statutory theme. The most common form of time period requires juveniles to wait before their record may be automatically expunged or sealed, or before they can petition to expunge or seal it.

The most common time period for a juvenile to wait before petitioning for sealing or expungement is between one and five years beginning at the time juvenile jurisdiction ends or upon completion of the sentence. Jurisdiction ends when the juvenile reaches the age of majority. Typically this is at age eighteen, but sometimes occurs other ages such as twenty-one. A juvenile sentence is completed when the juvenile leaves the corrections facility and completes any required probation.

The final appearance of a time frame is the period in which a juvenile has to remain out of the juvenile system in order to qualify for record sealing or expungement. Usually, this means that if a juvenile commits a crime within two years (the most common situation) of the first adjudication she will be unable to file a petition to have her records sealed.

VI. School Access

Allowing schools access to juvenile records in some capacity is statutorily mandated in a large number of states. Information sharing amongst juvenile courts, police agencies, and schools is commonplace across the nation. Many school systems have what is called a “school resource officer,” who acts as a liaison between the police department and a school system.

Numerous states have included sealing or expunging schemes that require immediate sharing of court and arrest records if a juvenile is charged with certain crimes. The majority of these provisions include offenses that occur on school property, as well as violent offenses, sexual offenses, and drug offenses. However, the scope of the statutes varies greatly, with some only covering crimes committed by a youth on school property involving drugs and alcohol, and others pertain to any offense committed by a youth enrolled in a public school.

In a large number of states there are also policies allowing a school administrator to file a motion requesting that a juvenile's record be shared with the school. This regulation is often concurrent with the regulations outlined above regarding the mandated sharing of certain crimes with a school administrator. If these provisions do not require that knowledge of crime to be shared, they still enable schools to gain access. There are a number of states that will not release records requested by schools without the consent of the youth's guardian or parent. However, a greater number of states do not require parental consent.

There is also a significant variance as to which officials within the school district may receive the juvenile's record. In many states it is solely the school administrator, while in others it is only the school superintendent or the school Board of Education. In other jurisdictions, multiple officials within the school system gain access, including the principal, school social workers, and the school's resource officer (police officer).

VII. Confidentiality

There are two aspects to the confidentiality theme. The first covers individuals who are allowed access to juvenile records prior to sealing and individuals that continue to have access after sealing. The second aspect relates to the consequences for distributing confidential, sealed records.

There are a number of individuals who are allowed access to juvenile records. In almost all states, the parents or guardians, the court, attorneys, and the court staff are all typically granted access. Other parties that are allowed access, with some set restrictions, are schools, persons conducting legitimate research, and organizations providing services to juveniles.

Individuals that have access to files after they are sealed commonly include the juvenile, parents or guardians, and the court. There is a wide array of people allowed access to sealed records that varies from state to state. In a majority of states, access to sealed records is limited to those entities that can obtain them through a court order. These include entities such as school administrators, government agencies, law enforcement, and groups conducting legitimate research, as well as the victims of the offense. Again, access to juvenile records and the specific information contained within may only be granted by a court order.

There are many states that offer statutory protection to prevent the unauthorized distribution of records. Such protection often includes marking records as confidential or requesting that entities with access to hard copies of the records return them to the court. A minority of states even levies monetary penalties for the unauthorized distribution of records.

VIII. Diversion Programs

Another theme that appears in state statutes, although to a lesser degree, is existence of diversion programs. Diversion programs allow a juvenile to avoid generating a court record. The name of the program varies from state to state and can be known as diversion, supervision, or counseling. Regardless of the name, the system is typically run by a probation officer, county clerk, or police department. The system allows the juvenile to complete community service, probation, counseling, restitution, or some combination thereof in lieu of facing adjudication. While programs operate differently amongst the states, the purpose of these programs remains

the same. If a juvenile can participate in a diversion program, then a court record is not created, and the collateral consequences of having a court record are remedied. Typically, the juvenile that qualifies for the program has only one delinquent adjudication that would not be considered a felony if committed by an adult. Also, the juvenile, her guardians, and the department that runs the program typically must agree to the program.

Diversion programs do not completely eliminate the possibility of a record however. There are several ways that a juvenile may still obtain a record. If the juvenile fails to meet the terms of the diversion program the juvenile will be called back into court and subjected to adjudication. If the juvenile commits another act of delinquency while on a diversion program the juvenile could face both the past and present charges in adjudication.

Some diversion programs keep records of the juvenile. Usually, the record is simply the juvenile's agreement to enter the diversion program. Typically, the record is only kept until completion of the program or up to six months after completion, at which point the record is sealed, expunged, or destroyed. Again, this varies from state to state. So while having a court record is avoided, another form of record is maintained. However, the diversion program record typically has much fewer collateral consequences than a court record.

Expanded Sample State Research

Following the completion of the fifty state survey, the Law Office classified each state into different groups or (types) according to its policies regarding expungement and sealing. Nine states were chosen with at least one representative from each of the categories for expanded examination. Part of the expanded examination included conducting telephone interviews with individuals with knowledge of the juvenile justice system in the selected states. When determining which states to research further the Law Office considered states that were similar to Massachusetts in size, region, and population demographics. In addition, a few states with unique approaches to juvenile records were also included in the expanded research to provide possible alternative approaches.

The expanded research was completed in two phases. The first phase involved further research into the states' statutory schemes, statutory history, and important court cases. In this phase the Law Office also sought to discern public opinion toward each state's juvenile record system by researching trends in state laws governing juvenile justice and looking at news coverage on the subject.

The next phase of our research included conducting interviews with knowledgeable individuals in the various states. The Law Office was able to speak with at least one individual in each state who had direct experience with the state's juvenile justice system, with the exception of New York. The purpose of these interviews was to ascertain how the statutes worked in practice and to gauge the interviewee's opinion of the effectiveness, fairness, and adequacy of the system in place.

It must be noted that the size of the field interview sample was limited and each person interviewed offered his or her opinion. The opinions reported should not be viewed as reflecting a consensus or majority view.

I. Connecticut

In Connecticut, a juvenile can file a motion to have the juvenile court record erased after a prescribed statutory period.[98] In order to be eligible for "erasure," the juvenile must meet certain requirements. First, the juvenile must be at least seventeen years old.[99] Second, at least two years must have passed since (i) the juvenile was discharged from court supervision, or, (ii) the point from which the juvenile was released from custody of a state agency such as the Department of Children and Families ("DCF").[100] In the case of certain serious offenses, the juvenile has to wait four years from the time she is released by the court or custodial agency.[101] There is no cost to the juvenile or her family to file a motion for erasure; all of the necessary forms and paperwork can be obtained at the courthouse.[102]

In order to qualify for erasure, the petitioning juvenile must show that she has not been convicted of a delinquent or criminal act during the waiting period, and there are no criminal or juvenile proceedings pending against her. Erasure will not be permitted unless all of these conditions are met.[103]

The juvenile record system in Connecticut differs from those of most states in that records are not stored electronically. Court records, police records, psychiatric records, and the notes of a juvenile's case manager or social worker are not computerized. Instead, they are kept in a confidential paper file, which few people may access. This practice has proven successful in keeping juvenile records safe from data-mining companies, state agencies, and others who are not statutorily authorized to access them.[104]

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[98] Conn. Gen. Stat. §46b-146 (LexisNexis 2011).
[99] Id.
[100] Id.
[101] Conn. Gen. Stat. § 46b-146 (LexisNexis 2011).
[102] Telephone interview O7 (Jan. 6, 2012).
[103] Conn. Gen. Stat. § 46b-146 (LexisNexis 2011).
[104] Telephone interview O7 (Jan. 6, 2012).

A paper system can have substantial benefits for the juvenile, as it allows for tight control of records. Unfortunately, there are negative consequences associated with the system as well. The interviewee explained that if the court were to acquire an up-to-date computer system onto which it could upload all juvenile records, Connecticut could then adopt a policy of automatic erasure after two years. The interviewee informed us that the Connecticut General Assembly (Connecticut's legislature) has been very open to, and even enthusiastic about, the idea of automatic erasure of juvenile records. However, no policy has been adopted because the current computer system for state court records is not able to accommodate such a process. The paper file system continues almost entirely for monetary reasons. Updating the computer system would be costly, and any proposed bill would likely be defeated due to the expense of such an undertaking.[105]

Connecticut's sealing by petition system has produced disparate impacts on juveniles. The interviewee stated that a juvenile from a two-parent household who does not change residences often is more likely to file a motion to erase her juvenile record than a juvenile who has less supervision, or is living on her own. According to the interviewee, a computer system that automatically erases records after a prescribed statutory period would be ideal because juveniles will often forget to apply for erasure after two years even if they are informed of this option at the time their case is disposed of.[106]

In light of these observations, a records system that requires a juvenile to petition in order to seal or erase a record may not be beneficial for all of Massachusetts' juvenile offenders.

II. Florida

In Florida, juveniles may petition to have their records sealed or wait to have the records expunged automatically upon turning twenty-four or twenty-six, depending on the

[105] Id.
[106] Id.

circumstances.[107] Generally, a juvenile's records are expunged five years after turning nineteen. However, if the juvenile is classified as a habitual offender, is convicted of a serious offense such as sexual battery, or is committed to a juvenile correctional facility, her record is expunged five years after turning twenty-one.[108]

A charge of delinquency is not considered the same as a conviction.[109] A juvenile court may also order the expungement of arrest records if the case is dismissed or the juvenile is adjudicated not delinquent.[110] The court does so on its own motion or in response to a petition subsequent to adjudication.[111] Juvenile records may also be expunged upon completion of a pre-arrest or post-arrest diversion program.[112] Employers may gain access to expunged records if they work in the field of public education or other work involving direct contact with children, criminal justice agencies or if they operate in Florida Seaports. The Florida bar may also access expunged records to determine admission to the legal profession.[113]

A juvenile may petition to have her record sealed at any time after the offense. A juvenile whose record is sealed need not disclose the record except when applying for employment with a criminal justice agency, admission to the Florida bar, a license to carry a firearm, or employment that involves working with children.[114]

Juvenile records are considered confidential under Florida law, although there are circumstances when they may be accessible.[115] If a juvenile (1) is convicted of a crime that would be considered a felony in adult court, (2) is convicted of more than three crimes that

[107] Fla. Stat. § 943.0515 (LexisNexis 2011).
[108] Id.
[109] Fla. Stat. § 985.35(6) (LexisNexis 2011).
[110] Fla. Stat. § 943.0585 (LexisNexis 2011).
[111] Id.
[112] Fla. Stat. § 943.0582(1) (LexisNexis 2011).
[113] Fla. Stat. § 943.0585 (LexisNexis 2011).
[114] Fla. Stat. § 943.059 (LexisNexis 2011).
[115] Fla. Stat. § 985.04 (LexisNexis 2011).

would be considered misdemeanors in adult court, or (3) is transferred to adult court, her name, photograph, address, and arrest report may be accessible to the public.[116] Additionally, public school administrators, juvenile justice agencies, and employers dealing with children, the elderly, or disabled persons may apply to the Florida Department of Law Enforcement to access juvenile records.[117]

Two individuals in Florida shared their experiences with the practical implications of the Florida system. Although neither interviewee felt able to describe a situation in which the juvenile records system worked particularly well, they both discussed instances where the system has worked particularly poorly. One interviewee said that the major problem with the current Florida system is that a record never goes away and so prevents well-intentioned people from moving forward with their lives.[118] The Law Office's second interviewee attributed the problems with juvenile records access to a legislative change in 1994.[119] While juvenile records are technically confidential, the Florida Department of Law Enforcement is permitted to sell all of the criminal history information in its possession, including confidential juvenile arrest and court records, as a result of the 1994 legislation.[120] Therefore, while juvenile arrest records are technically not subject to public inspection, the FDLE sells juvenile arrest records to qualified employers and agencies just as it does for adult records.[121]

The reality is that access to juvenile records is effectively quite open to the public, although it is nominally prohibited. Florida sells its criminal history data, including juvenile records, to private background checking companies before the records are sealed or expunged.

[116] Fla. Stat. § 985.04 (LexisNexis 2011).
[117] Fla. Stat. § 943.0542 (LexisNexis 2011); Fla. Stat. § 985.04 (LexisNexis 2011).
[118] Telephone interview O5, (Jan. 5, 2012).
[119] Telephone interview O4, (Jan. 5, 2012).
[120] Telephone interview O5, (Jan. 5, 2012).
[121] Id.

Thus, by the time records are sealed or expunged, they have often been widely released. Unfortunately, the result in such cases is that sealing and expungement fail to protect juveniles' privacy, as it is impossible to effectively erase what has already been released.

III. Iowa

In Iowa, a juvenile record may be sealed upon petition by the juvenile or upon the court's own motion.[122] A juvenile record may be sealed two years after the juvenile's final discharge from the court if the case against the juvenile was dismissed. However if the juvenile is adjudicated delinquent then the court must find that it is in the best interest of the of both the individual and the public in addition to requirements for those whose case was dismissed.[123] A motion for sealing may be filed at no cost to the juvenile, and all of the necessary forms and paperwork may be obtained at the courthouse.[124] Typically, a petition for sealing does not require the assistance of an attorney.[125]

Sealing is available only if the petitioner has no subsequent convictions for any felony or serious misdemeanor. The petitioner must also show that (a) he has not been convicted or adjudicated for any act that would constitute a felony or serious misdemeanor if committed by an adult, (b) there are no proceedings pending against him, and (c) he cannot have been classified as a youthful offender.[126]

Iowa's juvenile record sealing process is but one small part of an overarching process for dealing with juvenile offenders. Many of Iowa's juvenile offenders never receive a court record as a result of its commitment to keeping juveniles out of court. In 1975, Iowa reformed its juvenile justice system by developing a unique system of consent decrees and placing many

[122] Iowa Code Ann. § 232.150 (LexisNexis 2011).
[123] Id.
[124] Telephone interview O6 (Jan. 6, 2012).
[125] Id.
[126] Iowa Code Ann. § 232.150 (West 2011).

juveniles in diversion programs, where their cases are overseen by a juvenile court officer instead of a judge.[127] In Iowa, a consent decree is a final, binding judicial decree that memorializes a voluntary agreement between parties in a lawsuit in return for withdrawal of a criminal charge or an end to a civil litigation. Juvenile court consent decrees are used to oblige juveniles to complete a diversion program so that the charges against them may be dropped.[128]

According to the Law Office's interviewee seeing a record labeled "sealed" may alarm people and cause them to think that the crime was much more serious than it actually was. Iowa's juvenile justice therefore seeks to prevent a juvenile from "having a record in the first place."[129] For cases that do result in a juvenile record, sealing is quite commonplace. Iowa judges are very likely to seal a record. Furthermore, once the record is sealed, it is off-limits to the police, the court, and other state agencies.[130]

Despite the strong likelihood that a court will seal a juvenile record, all court documents are available online during the time between the adjudication and the point at which a juvenile becomes eligible for sealing. In 2007, the Iowa legislature passed a statute preventing a juvenile's court records from being placed on the online database when the case was dismissed or she was adjudicated not delinquent.[131] Unfortunately, this law does not protect juveniles who have been adjudicated delinquent.

Iowa has considered moving from sealing by petition after two years to a system of automatic sealing once the juvenile becomes an adult. The state is in the process of determining how best to construct such a system. There are many who argue that automatic sealing is desirable because juveniles who are living on their own or whose families are unstable are at a

[127] Telephone Interview O6 (Jan. 6, 2012).
[128] Id.
[129] Id.
[130] Id.
[131] Iowa Code Ann. § 232.147(2)(b) (West 2011).

disadvantage under the current system, as they are less likely to apply to seal their record after the two-year period.[132]

In addition, there is data suggesting that an automatic sealing system could be effective. Iowa conducted a five-year study of every juvenile first time offender who entered the juvenile system. This group was tracked in order to determine how many were charged with another crime in the same year, the next year, and the two subsequent years. The data consistently showed that if a juvenile was to commit an additional crime, she was likely to do so within eighteen months of the first offense.[133]

In Iowa, the sentiment is that the best way to eliminate the collateral consequences of having juvenile records is to prevent records from being created in the first place. In light of the data showing that an additional crime is most likely to occur within eighteen months of the first, two years appears to be a reasonable period of time to monitor juvenile offenders before sealing or expunging their records. Furthermore, records systems that require a petition in order to seal or erase a record may not be in the best interests of Massachusetts' juvenile offenders.

IV. Montana

In Montana, a juvenile record is automatically sealed upon the youth's eighteenth birthday, or immediately upon termination of court proceedings if they extend beyond that date.[134] The juvenile's records are open to the public until they are sealed.[135] The juvenile need not complete any program or take any steps for her record to be sealed, but he must fulfill all the requirements imposed by the judgment in his case.[136] Juveniles that are required to register as

[132] Telephone Interview O6 (Jan. 6, 2012).
[133] Id.
[134] Mont. Code Ann. §41-5-216 (West 2011).
[135] Mont. Code Ann. §41-5-215 (West 2011).
[136] Mont. Code Ann. §41-5-216 (West 2011).

sex offenders are ineligible to have such records sealed.[137] If a juvenile with a sealed record commits another offense, the record may be made available to certain agencies and probation staff upon a showing of good cause.[138]

Montana's juvenile record system has the same major weakness as Florida's system. Since the records are public until the juvenile's eighteenth birthday, data mining companies have already obtained them by the time they are sealed.[139] While it is a criminal offense to disseminate sealed records, the interviewee indicated that charges are rare, and thus these sanctions are often illusory.[140] Therefore, a juvenile's record is very likely to haunt her in material ways, possibly for the rest of her life.

Massachusetts could view Montana as a cautionary tale against public availability of juvenile records for any length of time. If juvenile proceedings are to be effectively sealed or expunged, then the records must be kept confidential from the start. Even if companies and individuals that distribute juvenile records are prosecuted or held liable, said distribution could still occur as long as it is profitable.

V. New Hampshire

New Hampshire does not allow for expungement or sealing of juvenile records. However, the records of juveniles who are adjudicated delinquent are closed and placed in an inactive file when they turn twenty-one.[141] This practice is probably most comparable to sealing. Juvenile records are kept separate from adult records, and there is a statutory penalty for breaching the

[137] Id.
[138] Id.
[139] Sarah Montana Hart, The Collateral Consequences of Juvenile Publicicity, Mont. Law. (State Bar of Montana), Feb. 2011, at 7, 25.
[140] Telephone interview O8 (Jan. 10, 2012).
[141] N.H. Rev. Stat. Ann. § 169-B:35 (2011).

confidentiality of juvenile records.[142] Juvenile records may be used in court if the individual later faces charges as an adult.[143]

A prosecutor characterized the current system as working very well. She emphasized that there is no centralized system for juvenile records, so a county attorney seeking the juvenile record would have to guess what court heard the defendant's case. In practice, this makes it very difficult for a prosecutor to access juvenile records. The interviewee recollects doing this only once in the six years she has been on the job. She suggested that a juvenile record is often more helpful to a defense lawyer, by documenting the defendant's difficult childhood, than it is to the prosecution. However, post-conviction, the pre-sentencing investigation considers everything in defendants' lives, including their juvenile record. The interviewee stated that she is unaware of any instances of leaked juvenile records in New Hampshire, and that the state takes confidentiality very seriously. She added that she does sometimes see juvenile record information attached to adult CORIs of former Massachusetts residents, and finds this worrisome.[144]

The key lesson from New Hampshire may be that if confidentiality of records is understood to be a priority, then expungement or sealing may not be necessary. The lack of centralization and difficulty of access associated with the New Hampshire juvenile record system may actually provide a compromise of sorts, by allowing access to law enforcement at a level of inconvenience that guarantees no one will make the requests lightly. There do not appear to be any advocacy groups in New Hampshire arguing for expungement or sealing, or any proposed legislation at this time. This may indicate that confidentiality of records is not the same problem

[142] N.H. Rev. Stat. Ann. § 169-B:35 (West 2011); N.H. Rev. Stat. Ann. § 169-B:36 (West 2011).
[143] N.H. Rev. Stat. Ann. § 169-B:35 (West 2011).
[144] Telephone interview O1 (Dec. 29, 2011).

in New Hampshire as it is in Massachusetts. It should be noted that New Hampshire is a small state, and has not yet computerized many records.[145]

VI. New Jersey

In New Jersey, expungement is available by petition.[146] Expungement requirements vary depending on the nature of the juvenile's offense.[147] However, expungement is not available under any circumstances for certain violent crimes such as murder, kidnapping, and sexual assault.[148] Upon expungement, the juvenile's unlawful act will be deemed to have never occurred.[149] There is a fee of $30.00 for the administrative costs of expungement.[150] New Jersey's sealing policy requires that two years have lapsed since the juvenile's last court order and that he has not been subject to any subsequent convictions or pending complaints during that time.[151] The juvenile's record can also be sealed upon enlisting in the Armed Forces.[152] The court can allow inspection of sealed records upon a motion. After sealing, "[a]ny adjudication of delinquency or conviction of a crime subsequent to sealing shall have the effect of nullifying the sealing order."[153] Anyone disclosing an expunged or sealed record is subject to a fine of $200.[154]

Generally, juvenile records are strictly safeguarded and are not available to the public for inspection. The court has discretion to allow public agencies providing care to the juvenile, school superintendents, law enforcement, probation, courts, and others having a direct interest

[145] Id.
[146] N.J. Stat. Ann. § 2C:52-4.1 (West 2011).
[147] Id.
[148] N.J. Stat. Ann. § 2C:52-2(b) (West 2011).
[149] N.J. Stat. Ann. § 2C:52-27 (West 2011).
[150] N.J. Stat. Ann. § 2C:52-29 (West 2011).
[151] N.J. Stat. Ann. § 2A:4A-62(a) (West 2011).
[152] Id.
[153] N.J. Stat. Ann. § 2A:4A-62(e) (West 2011).
[154] N.J. Stat. Ann. § 2C:52-30 (West 2011).

access juvenile records upon a showing of good cause. However, a school is not permitted to maintain these records.[155]

A court may authorize access to a sealed record, and the record will be unsealed if there are subsequent violations.[156] These sealing and expungement options have been effective in many cases. However, there are problems with collateral consequences due to records being obtained by independent data-mining companies.[157]

The New Jersey field interview revealed some confusion. Since the State has both sealing and expungement, the Law Office inquired as to the effect of sealing and how it differs from expungement. The interviewee said most people are puzzled as to what sealing is. Sealing is not available by petition and can only be set in motion by a judge. Once a record is sealed, it can only be disclosed to a judge for sentencing purposes. The interviewee believes that expungement (as well as sealing) has had a positive effect in protecting juvenile records, but he expressed the concern that juveniles and their parents are sometimes given misleading information about what is sealed and what is unprotected. In addition, people are not aware of what they need to do in order to expunge their records. This creates confusion when a former juvenile is applying for employment or to join the military, and may adversely affect her chances. Most of the concerns with the current system are attributed to changes in the governing statute that occurred about fifteen years ago, which allowed greater public access to juvenile records. The interviewee explained that the sale of information and data mining is legal, which raises concern as to the effectiveness of the current juvenile records system. However, the interviewee's immediate

[155] N.J. Stat. Ann. § 2A:4A-60 (West 2011).
[156] N.J. Stat. Ann. § 2A:4A-62 (West 2011).
[157] Telephone interview O9 (Jan. 11, 2012).

concern, relates to the education of juveniles about what to expect with regard to their juvenile records.[158]

The New Jersey system raises the issue of data mining yet again. Once information is in the computers of background checking companies, it does not seem to leave. As a result of the distribution of juvenile records by data mining companies, a number of juveniles have been dismissed from their jobs due to discrepancies between the information they disclosed and the information included in separate background checks.[159] An overly complex statutory system may have the effect of confusing juveniles and their families while frustrating their attempts to protect the juvenile's records.[160] A simple, widely distributed explanatory guide to the sealing process would be helpful in this regard.

VII. New York

In New York a juvenile's records are be sealed automatically if the court adjudicates the youth not delinquent.[161] However, a court may decide not to seal a juvenile's record if doing so is not in the interest of justice.[162] The records of these proceeding are not made available to any person, public agency, or private entity.[163] Juveniles adjudicated delinquent may motion the court to seal their records by filing a written "motion to seal" upon their sixteenth birthday, unless they commit a felony.[164]

A positive aspect of New York's system is the age in which a youth can petition to have her juvenile record sealed. New York allows juveniles to petition two to four years before most other states. However, in New York, unlike in other states that extend juvenile jurisdiction to the

[158] Id.
[159] Id.
[160] Id.
[161] N.Y. Fam. Ct. Act §375.1(1) (McKinney 2011).
[162] Id.
[163] Id.
[164] N.Y. Fam. Ct. Act §375.2 (McKinney 2011).

age of seventeen or eighteen, a juvenile is categorized as a youthful offender regardless of the level of offense upon turning sixteen.[165] In recent years, many organizations within the State of New York have been vocally oppositional to what they see as a system that treats youths far too harshly.

Many of these groups have been active in crafting recommendations to improve the State's mechanisms for dealing with teenagers and youths. Writing in the New York law journal; Chief Judge of New York Jonathan Lippmann explained his reasons for lobbying Governor Andrew Cuomo to adopt new pilot programs for dealing with juvenile offenders.

> "The commission has taken a careful and deliberate approach, taking all views into account and identifying potential pitfalls. Given the funding and workload issues implicated by raising the age of criminal responsibility, change may need to be phased in to allow for smooth transition. Nonetheless, the time for change has come. We have studied the issue of teenaged defendants for 50 years, and we no longer have the luxury of long contemplation. We must act to put troubled young people back on track to live law-abiding, productive lives. It has been said that "it is easier to build strong children than to repair broken men." If we continue to push children into a criminal justice system that exacerbates problems rather than solves them, we are failing them and ourselves."[166]

At the beginning of January 2012, nine pilot courts opened throughout New York to handle criminal cases with sixteen and seventeen year old defendants, who many in the state felt would benefit from a criminal justice response that included more age-appropriate services, interventions, and penalties. The courts will operate by taking into account the age and circumstances of the defendants and will emphasize accountability, treatment, and supervision in crafting outcomes.[167] This process will involve the close collaboration of attorneys, probation officers, and third-party service providers such as the Offices of Children and Families as well as law enforcement.

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[165] N.Y. Crim. Proc. Law §720.10 (McKinney 2011).
[166] Chief Judge of New York Jonathan Lippmann, "Rethinking Juvenile Justice" New York Law Journal (2012).
[167] Id.

The State of New York is moving in a direction which will markedly change the focus of their efforts in juvenile justice to protection of the juvenile, over protection of society. The idea that teenagers are still developing, even at sixteen and seventeen, has become much more prevalent. As a result, those who advocate for and work with children see the State's current system, which treats all juveniles over the age of sixteen as adults, as creating consequences that far exceed the crimes which have been committed.[168]

VIII. Ohio

Ohio has both sealing and expungement options for juvenile records, either of which may be attained automatically or by petition.[169] The court also has the discretion to seal juvenile records on its own motion.[170] If a juvenile has been acquitted of a charge, the charge is resolved without the filing of a complaint, or the charge is dismissed, an order is issued to seal the record automatically.[171] Sealing may also be attained upon completion of a rehabilitation program.[172] Most sealed juvenile records are automatically expunged five years after they were sealed, or when the individual turns twenty-three. Other records require a petition for expungement.[173] Five categories of offenses, which constitute forms of murder or sexual assault, are ineligible for sealing or expungement.[174] While juvenile records are traditionally kept confidential with only the juvenile and his parents or guardians can access them, however, they may be discoverable in civil litigation.[175]

The field interview with two members of the public defender's office revealed that Ohio's system is not the same in practice as it is in theory. On paper, Ohio appears to have a strong,

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[168] Id.
[169] Ohio Rev. Code Ann. § 2151.356 (LexisNexis 2011).
[170] Id.
[171] Id.
[172] Id.
[173] Id.
[174] Id.
[175] Id.

nuanced system, allowing records to disappear that arguably should never have ever been created, and allowing juveniles seeking a clean record to petition for sealing if they complete a rehabilitation program. However, the system seems to work quite differently in practice.[176] There are eighty-eight counties in Ohio, and the juvenile judges have almost unlimited discretion in handling juvenile records. Some judges routinely order records sealed, setting them on the path toward automatic expungement.[177] However, other judges are reluctant to seal without a petition, and some judges rarely grant such petitions.[178]

In general, juveniles in Ohio seem unaware of the option to petition for sealing, and there is no statewide system designed to inform them. Cost can also be prohibitive for the juvenile who would like to petition for sealing. Costs vary greatly by county, with relatively poor, rural counties charging a higher filing fee. The discretion of Ohio's county judges is something the interviewees found worrisome, and is something that the legislature may address in 2012.[179] The governor is interested in reforming the juvenile record system to develop a more cohesive statewide policy to protect the confidentiality of juvenile records.[180]

Ohio exemplifies a multi-faceted structure for sealing and expungement. Juveniles have the option of automatic sealing if they are adjudicated not delinquent and sealing by petition for those adjudicated delinquent of less serious offenses.[181] After a reasonable time frame, the records are automatically expunged.[182] Based on the Law Office's interview, the State's major failure is its inability to produce statewide standards to be applied by judges in ruling on petitions

[176] Telephone Interview O2, Subject 1 (Jan. 4, 2012).
[177] Id.
[178] Id.
[179] Id.
[180] Id.
[181] Ohio Rev. Code Ann. § 2151.356 (LexisNexis 2011).
[182] Ohio Rev. Code Ann. § 2152.85 (LexisNexis 2011).

for sealing.[183] The State also lacks a clear plan for informing juveniles of their sealing and expungement options.[184]

IX. Pennsylvania

Pennsylvania provides an option for expungement.[185] In general, juveniles must petition for their records to be expunged. Juveniles may petition for expungement if (1) the charges against them have been dropped or not substantiated, (2) it has been six months since their discharge from a consent decree or court supervision, (3) five years have passed since an adjudication of delinquency, or (4) the juvenile reaches the age of eighteen.[186] There is some variation by county, notwithstanding Pennsylvania statutory law, as some counties allow automatic expungement under certain circumstances, while at least one county does not allow expungement at all.[187] The records of juveniles age fourteen or older, whose offenses would be considered felonies if committed by adults, are public statewide.[188] The same is true for the records of juveniles age twelve and older who commit murder, manslaughter, aggravated assault, arson, kidnapping, rape, involuntary deviate sexual intercourse, and some types of robbery.[189]

This system suffers from the inconsistency of county-based applications.[190] Some judges refuse to order expungement for certain offenses, and some judges believe that the district attorney should have the final say.[191] Due in part to the lack of centralized policy and the difficulties in monitoring or reviewing its administration, some courts have been known to ignore

[183] Telephone Interview O2 (Jan. 4, 2012).
[184] Id.
[185] 18 Pa. Cons. Stat. Ann. § 9123 (2011).
[186] Id.
[187] Telephone Interview O3 (Jan. 4, 2012).
[188] 42 Pa. Cons. Stat. Ann. § 6336 (2011).
[189] Id.
[190] Telephone Interview O3 (Jan. 4, 2012).
[191] Id.

the statute, or to violate the rules and procedures that are ostensibly in place.[192] The Law Office's interviewee explained that it is very difficult to track whether a record actually becomes expunged when the court orders, or if it is simply marked and kept in filing for future access.[193]

In many ways, Ohio is similar to Pennsylvania in that confusion and arbitrary differences on a county-by county basis appear to result from the inconsistencies prevalent in both systems.

[192] Id.
[193] Id.

Law Office Major Recommendations

In the course of the Law Office's research, the Law Office encountered many different options and theories about how to best balance the state's interest in the welfare of its minors and the rehabilitative nature of juvenile justice against the concern for public safety and the belief that offenses should be punished. After conducting this research, the Law Office believes, like many of Massachusetts interviewees, that the current Massachusetts policy regarding the maintenance of juvenile records fails to adequately protect juveniles from the collateral consequences of their court records. The only way to protect juvenile records is to petition to have them sealed. Several interviewees indicated that sealing occurs rarely and seems to draw attention to the record, thus a sealed record may be more damaging than an unsealed one.

The Law Office has considered many options for reform. These options include ones that require minor adjustments and some that call for large-scale reform. These options are discussed in the section entitled "Further Reform Options." However, the Law Office wishes to make three major recommendations that could improve the Massachusetts system significantly. First, the Law Office believes that a statewide diversion program for juveniles would be a proactive approach to preventing juveniles from acquiring records in the first instance and would eliminate needless, and often damaging, collateral consequences. Second, the Law Office believes that a tiered system of expungement which allows automatic expungement for offenses which would be misdemeanors for adults, and expungement by petition for those offenses that would be felonies if committed by adults, would help rehabilitate juveniles without unduly endangering public safety. In the alternative, if expungement should prove politically impractical the Law Office would advocate an automatic sealing system. Finally, the Law Office believes that the simplification and reworking of juvenile CORI forms would resolve confusion and avoid the collateral consequences which result.

I. Diversion Programs

Diversion programs have been gaining popularity throughout the country as part of a renewed interest in rehabilitative justice both for adults and for juveniles. They offer a unique "front door" solution to avoiding the consequences of a juvenile record because they prevent the creation of court records in the first place. The most effective way to prevent the damage that can be caused by having a juvenile record is to prevent that record from being generated.

If the state were to implement more widespread diversion programs, establishing the programs and hiring the staff would come at a considerable expense. This expense would be mitigated by money saved by having less youth appearing before the court and incarcerated. The cost of implementing diversion programs would require further research.

Diversion programs create an alternative means to rehabilitate persons outside of the traditional penal system. These programs allow a person to participate in community service, counseling, restitution or some combination thereof in lieu of more traditional sentences such as incarceration and fines. The goals of these programs are to treat the causes of prohibited activity, to focus on fixing the root of the problem which has led to the prohibited behavior, and to give the offender the tools and skills to be gainfully employed members of society and to decrease the likelihood that they will re-offend.[194]

It seems that diversion programs and the juvenile justice system are uniquely suited to each other. When separate juvenile courts were established in the United States, the ultimate goal was to remove juvenile offenders from the punitive system of criminal courts and encourage rehabilitation based on the juvenile's needs. This system was to differ from the adult criminal

[194] Where a person has committed a drug offense for instance, in court they may be forced to pay a fine or spend a period of time in jail and/or on probation. Diversion programs create an alternative where a person who committed a drug offense could be placed in a specific program that mandates they complete drug counseling, community service, or submit to drug tests, etc.

court in a number of ways by focusing on the child as a person in need of assistance rather than the offense committed by the juvenile.[195] The inclusion of diversion programs in the juvenile justice system would expand the court's ability to meet those goals by protecting youth from the creation of an official court record. Such inclusion would also provide a wider range of options for rehabilitation, consequently allowing the state to tailor programs to meet the needs of the specific offender.

Research has shown that juveniles respond particularly well to diversion programs and therapy.[196] In recent years extensive studies have been conducted mapping the development of the brain from childhood to adulthood. [197] Researchers have discovered that the areas of the brain that govern judgment, reasoning, planning, foresight, controlling impulses and appreciation of consequences are not fully developed until a person reaches their early twenties.[198] Many juvenile and legal advocacy agencies have pointed to this research as being evidence which supports the implementation of diversion programs in juvenile courts. The American Bar Association (ABA) has advocated that the juveniles' underdeveloped state of mind lends itself to successful rehabilitation and change of behavior.[199]

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[195] National Research Council. Juvenile Crime, Juvenile Justice. Washington, DC: The National Academies Press, 2001.

[196] Johnson, Robert M.A. Diversion and restorative justice in the United States: Traditional practices and emerging trends. Paper presented at the 6th annual conference and general meeting of the International Association of Prosecutors. Sydney, Australia. (September 2-7, 2001) http://www.restorativejustice.org/university-classroom/02world/nothamcar/juvenile

[197] Sowell, Elizabeth R, Paul M. Thompson, Kevin D. Tessner and Arthur W. Toga. Mapping continued brain growth and gray matter density reduction in dorsal frontal cortex: inverse relationships during post-adolescent brain maturation, 21 Journal of Neuroscience 22 (2001), at 8819, also Reiss, A.L., et. al., *Brain development, gender and IQ in children, a volumetric imaging study.* Brain, 119 (1996).

[198] Gogtay, N., J. N. Giedd, et al. (2004). *Dynamic mapping of human cortical development during childhood through early adulthood*. Proceedings of the National Academy of Sciences of the United States of America 101(21): 8174-8179. Also Casey, B. J., N. Tottenham, et al. (2005). *Imaging the developing brain: what have we learned about cognitive development?* Trends in Cognitive Sciences 9(3): 104-110.

[199] American Bar Association, Juvenile Justice Center. Cruel and Unusual Punishment: The Juvenile Death Penalty: Adolescence, Brain Development and Legal Culpability. Washington, DC: 2004

Three counties in Massachusetts (Barnstable, Dukes and Nantucket County) currently offer diversion programs.[200] There are various forms of diversion operating in different parts of the country. If Massachusetts were to implement a diversion option it would be crucial to examine which diversion programs worked in each area. A diversion program that might be successful in suburbia might be untenable in a rural or urban area and vice versa, so some measure of local discretion would be important.

Juveniles who enter diversion programs are not guaranteed to avoid generating a record. As the diversion programs are entered post arraignment any records generated would be expunged upon the successful completion of the diversion program. The programs provide an opportunity for the juvenile to avoid the record if he is capable of maintaining good behavior and completing all required elements of the program. The program acts as a buffer by providing persons and the state an option for resolving offenses outside the traditional scope of the criminal justice system. If a youth fails to complete the diversion program, he will be charged and brought into court. A youth may not take his diversion seriously, clash with his supervisors, or maybe even drop out of the program. In these cases a youth most likely will end up in court, with a record, and subject to the collateral consequences which stem from that record. Thus the programs provide opportunities for juveniles to avoid generating records while also requiring juveniles to take responsibility for their own futures.

II. Protection of Juvenile Records: The Expungement Option

While diversion programs can limit the number of records being generated, these programs do not address the collateral consequences of juveniles who do have records. The best way to help juveniles who acquire records would be to implement a tiered system involving both

[200] See Appendix for procedures governing the programs.

automatic expungement and expungement by petition depending on the severity of the offense. Some states such as Texas and Ohio already distinguish the available options for expungement or sealing under a tier system based on the severity of the offense.[201]

Under current Massachusetts law, juvenile records do not disappear once the juvenile turns eighteen. If a person with a juvenile record chooses to pursue a certain career, such as one which involves working with children, the elderly, or infirm, the juvenile record can follow this person for life.

Massachusetts currently only offers one remedy for eliminating the consequences of a juvenile record: sealing by petition. This remedy is rarely utilized because it requires the formerly delinquent youth to initiate proceedings after having complied with strict requirements and because many people who work in the judiciary or law enforcement actually regard a sealed record as more suspicious than an unsealed one. Owing to such suspicions, lawyers will often advise juveniles against sealing a record.

Tier One – Automatic Expungement Following Case Resolution

The Law Office recommends a system that would automatically expunge all records in which the charges brought were dropped or the juvenile was found not delinquent immediately following the resolution of the case. (Cases where the charges are dropped following the successful completion of a diversion program would also be automatically expunged.) The current Massachusetts system does not allow expungement where a juvenile was charged due to mistaken identity.[202] The Law Office believes that unless there is enough evidence to adjudicate a minor as a delinquent, the arrest and court records should immediately be destroyed, thereby avoiding any collateral consequences.

[201] See 50 State Survey for discussion of Texas and Ohio.
[202] Commonwealth v. Boe, 456 Mass 337 (2010).

Tier Two – Automatic Expungement Following Successful Completion of Disposition

For minors who are adjudicated delinquent for offenses that would be considered misdemeanors if charged as adults, the Law Office would recommend automatic expungement two years following the successful completion of the original disposition assuming no subsequent charges had been brought during such time. The Law Office would include a caveat allowing the office of the prosecutor who handled the case the opportunity to object to the expungement and request a hearing to determine whether to expunge the record. If the judge grants this request the burden of arguing for denying expungement would be entirely on the prosecutor. The Law Office does not believe this would occur often because district attorneys and judges' desire for judicial efficiency as well as and busy schedules should keep these hearings to a minimum. However, allowing these hearings provides a chance to protect the public safety in cases where law enforcement truly believes a former juvenile delinquent is dangerous to the public. This exception to automatic expungement provides a way to balance the juveniles' right to confidentiality and rehabilitation against professional judgments that the individual poses a risk to others.

Tier Three –Expungement by Petition Following Completion of Disposition

The third tier regards juveniles who were adjudicated delinquent for offenses that would have been considered felonies if tried as adults. The Law Office believes that expungement is a proper option for these cases two years following successful completion of the original disposition with no further charges. The Law Office would recommend in these cases that expungement should be by petition. Statistics indicate that most recidivism occurs within 180

days of the first offense,[203] so if the juvenile has not re-offended by then, the Law Office believes he should have an opportunity to clear his record.

However, to reflect the more serious nature of the offense the Law Office feels the former delinquent should initiate the process after completing all other requirements. This represents an additional demonstration of a commitment on the individual's part to reestablish himself as a productive member of society. Again the prosecutor's office will have an opportunity to object and request a hearing to any of these petitions for expungement. The burden would again be on the prosecutor to demonstrate the government's interest in denying expungement. Murder cases are automatically removed to an adult court and are therefore not an issue for juvenile courts.

Expanded Sealing: An Alternative Solution

Though the Law Office is in favor of the tiered expungement system described above, the Law Office has observed opposition both within the state and throughout the country to this kind of reform. The Law Office feels that the word expungement may carry negative connotations in both the political and law enforcement sectors. If opposition to expungement seems insurmountable the Law Office believes an expanded sealing effort could provide a reasonable, but slightly less effective, alternative to expungement.[204]

The vocabulary surrounding expungement and sealing of records is often interchangeable. In many states a practice which is called sealing is called expungement or erasure in another. If a system of automatic sealing is in place which would allow former juvenile delinquents to say that no record exists, thus removing the negative suspicions and

[203] Division of Criminal and Juvenile Justice Planning, Iowa Department of Human Rights, State of Iowa Juvenile Delinquency report: State Fiscal Year 2007 (2007), available at http://www.humanrights.iowa.gov/cjjp/images/pdf/SFY2007DelinquencyServices-FinalReport.pdf.

[204] This sealing system would identical to the tiered expungement system addressed above except that records would be sealed instead of expunged.

connotations around a sealed record, it may provide very similar benefits to an expungement system.

III. CORI Reform

The last change the Law Office would recommend would be to modify the contents of the juvenile Court Offender Record Information ("CORI") report to simplify it and thus avoid collateral consequences that flow from having that record be misread and/or misunderstood. A CORI report contains a person's criminal history. Any person charged with a crime in a state or federal court in Massachusetts has a CORI, regardless of the outcome of case.[205] Reviewing CORI reports has become a standard practice in Massachusetts allowing employers, school administrators, public housing officials, and others to screen out ex-offenders. This process has created a substantial potential barrier to employment,[206] housing,[207] loans, education and other services for people with juvenile or criminal records.

CORI reports can be complicated and difficult to understand. The way information is presented on a CORI report may make the number and gravity of the offenses listed unclear. This is especially true when the party receiving the CORI report is not an officer of the court and unfamiliar with its conventions. By simplifying the CORI reports, they will be made more understandable and thus decrease the probability that they will be misread. Another way to ensure that CORI reports be read correctly would be to provide anyone with access to CORI

[205] This includes circumstances where the case was dismissed.

[206] Massachusetts employers can refuse to hire you because of your criminal record, even if you are qualified for the job. Starting May 4, 2012 you will have the right to a hearing to discuss the accuracy or relevance of the information in your CORI. American Civil Liberties Union, Massachusetts Law Reform Institute, *2010 CORI Reform Explained — How the law is changing, and when.,* (November 10, 2010) available at http://www.masslegalservices.org/node/34488.

[207] Public housing agencies can disqualify you from public housing or subsidized housing (such as Section 8) based on your CORI or the CORI of any adult member of your household. You have the right to a hearing to discuss the accuracy or relevance of the information in your CORI. Boston Hous. Auth. v. Garcia, 449 Mass. 727, 871 N.E.2d 1073, 1077 (2007).

reports some form of "reader education." A small change, such as sending out an explanatory fact sheet or pamphlet with all CORI's may make a big difference.

Reforming the CORI process as well as the contents of the form itself could help to alleviate some of the barriers the current CORI system creates for persons with a juvenile record. The state has already taken some steps to refine the CORI process by passing reforms which began going into effect in 2010.[208] Most of these reforms regard access to CORI records.

If the forms are going to be changed it is imperative that the changes apply to existing records, not just going forward. If those CORI forms which already exist are not updated to the simpler forms existing records may appear more damaging than they are.

[208] American Civil Liberties Union, Massachusetts Law Reform Institute, *2010 CORI Reform Explained — How the law is changing, and when.,* (November 10, 2010) available at http://www.masslegalservices.org/node/34488.

Further Reform Options

Though the recommendations above represents the Law Office's assessment of how best to reform the current system of juvenile record maintenance in Massachusetts, there are other smaller changes available which would improve upon the current situation for juveniles. Many of these changes listed below could be accomplished without the same level of political support and money that the major recommendations would need. However, the Law Office still believes that these changes could have some benefit so they have been listed. The options are divided up into the three categories: education, assistance, and additional protection.

I. Education

The recommendations in this section are tailored for reforms within the current system that can be accomplished through education initiatives. These recommendations are ways to attempt to help juveniles without externally changing the system. These recommendations are divided up into subsections based on whom the education initiatives would be aimed at helping.

Post Court Trainings

One direct and simple initiative would be to create training sessions for a juvenile once he enters the system and receives a record. These trainings would be designed to help the juvenile understand when he has to reveal his record and when he does not, thereby minimizing collateral consequences particularly for potential employment or further police interaction. The trainings could also discuss the possibility of sealing. The trainings could be conducted either by the probation office or by a volunteer social service agency. This initiative could have a positive impact because it focuses on the people who need assistance the most: juveniles who have been charged and are in the

system. It can emphasize the seriousness of having the record, what exactly juveniles have to reveal to whom, and how confidential the record is.

However, this plan could have negative aspects as well. Some negative aspects include the potential cost for whoever conducts these trainings, the risk of imposing an additional court-ordered burden on a newly adjudicated juvenile and the fact that it may be hard for juveniles from underprivileged backgrounds to attend the programs. In addition, this solution only assists juveniles after they have entered the system.

School Assemblies

School assemblies are another relatively easy way to improve juveniles' awareness about the consequences of juvenile records. The structure for school assemblies is already in place so implementing a presentation designed to address this issue would consist of training speakers and producing a PowerPoint or video and some literature to accompany the assemblies. This option has the added advantage of reaching all juveniles in the school system and also sending a preventive message warning juveniles of the serious consequences of delinquent behavior. There is also the possibility of tying this information into a civics curriculum.

Some issues with this plan may be the lack of attention paid by children in typical school assemblies, the possibility of distorted information emerging and being spread, and the fact that due to truancy, suspensions and expulsions some of the juveniles most in need of this information will not receive it.

Written and Multimedia Materials

Producing written and multimedia materials is probably the least expensive and easiest way to attempt to improve juveniles' understanding of the juvenile record system.

Written pamphlets that could be available in schools, social worker offices, courthouses and communities are a simple way to enumerate important facts about juvenile records and highlight that juvenile records are not something to dismiss. Even if juveniles are unlikely to read a whole pamphlet until confronted with charges, they could remember having seen one and go back to look at one or find it online. There should also be a website containing all these written materials and perhaps some video or slideshow information as well. The pamphlets could refer interested parties to the website for further information. Additional government websites and willing and relevant private partners should also include links to these materials. Other than the cost of producing these materials and maintaining a website, there does not appear to be any serious negative consequences to this initiative.

Information for Juvenile Judges

Judges have a unique position of authority for juveniles experiencing their first day in court. A simple explanation of what a juvenile record means from an imposing figure such as a juvenile judge as well as references to more materials could further educate a juvenile about the juvenile justice system. Contact with a juvenile judge is brief but if juvenile judges were willing to explain the consequences of a juvenile record, they could easily impress upon the juveniles the importance of their records and possibly motivate the juveniles to inquire for more information.

Defense Lawyer Training

A program to provide training for juvenile public defenders (and perhaps private ones as well) on how to explain the records system to their clients would be effective and

reach the targeted audience. As lawyers the defense attorneys should already possess a good understanding of the records system. If these lawyers were required to spend some time ensuring that their clients understand the consequences of their records and if they are provided with additional materials and training, they would be in a good position to ensure that juveniles do not leave the courthouse without understanding what their records mean and what options exist to deal with it. The major negative with this effort is that it provides an additional burden on the public defenders, who likely are already struggling to handle their caseloads. However, it seems like a worthwhile way to indirectly educate the juvenile populace.

Employer Education

Another initiative could be to educate employers on what they can and cannot ask about juveniles' records. While this may seem like a useful initiative, the backlash may outweigh any gains that such an effort could produce. Sending a pamphlet detailing the current statutory requirements for the confidentiality of juvenile records might antagonize certain employers to push for legislation that decreases the confidentiality of the records. It also seems likely that many employers would simply disregard such a pamphlet.

Intra-System Training

This option focuses on reworking the current training received in agencies that handle juvenile records. This is a hard issue to address, because opinions were divided on both the thoroughness and success of the current program. However, there has been enough concern expressed that it might be worthwhile to investigate the current system and conduct an objective study to its effectiveness in protecting juvenile records.

II. Assistance

Another way to possibly improve the juvenile records system in Massachusetts would be to provide great assistance for those juveniles who are already in the system. The Law Office's research has yielded three ways in which this could be accomplished. The lawyers who work with juveniles could undergo training, the court could maintain a list of lawyers willing to work on sealing issues for free, or free legal services available could extend through sealing or expungement proceedings. Each of these suggestions carries advantages and disadvantages, some of which are presented below.

Training

The attorneys who work with juveniles could be provided with additional training on juvenile specific issues. In this case, the goal would be to have follow-up with the juveniles after the adjudication process at a time when the record could be eliminated. One clear advantage of this approach would be that there would be no additional cost to the juveniles.

Just as there are advantages to this initiative, there are disadvantages. The juvenile may be hard to contact. As families move, there is not an easy way to ensure that address and contact information is kept up to date. One way to mitigate this challenge is to get as much contact information as possible (e.g., phone numbers, E-mail addresses, address, social media sites). This initiative would increase the burden on attorneys who may already be overworked.

Pro-bono List

An additional way to increase the assistance available to juveniles involved in the juvenile justice system would be to maintain a list of attorneys who are willing to work on sealing and expungement cases for free. It will likely be a rather inexpensive change

to make because the only additional obligation upon the state is to keep and maintain the list. This change, like the training program described above, would result in legal assistance for the juvenile without imposing any additional cost on him or his family. A further advantage is that the voluntary nature of the list would result in dedicated and interested people working with the youth.

The disadvantages of this approach are few, but significant. The list, as of now, is nonexistent, so it is not obvious that there will be great support for it. Even if there is support for the program, there is no guarantee that there will be enough support to provide services for the volume of juveniles who need representation. These disadvantages should be taken not as an absolute bar to the success of the program, but as a limiting factor for its overall result. Any additional services made available to juveniles in need of legal representation for sealing and expunging would be a positive change.

Extend Legal Services

One approach taken by other states is to extend the availability of court appointed legal services through the sealing or expungement process.[209] An advantage here is that the juvenile would, upon reaching eligibility for sealing or expunging the record, have a familiarity with the attorney with whom she works. Furthermore, in some cases the only constant in a juvenile's life is the attorney representing him. This approach encounters some of the difficulties expressed above. The challenge of contacting juveniles may be problematic as families move and the risk of placing more responsibility on an already exceptionally busy legal services attorney are both hurdles to be considered.

III. Penalties for Sharing Information

[209] See California and Connecticut in the 50 state survey (found in the appendix) for examples of states that extend court appointed legal aid.

One final recommendation that should be considered is refining and extending the penalties for sharing juvenile records. Juvenile records can be accessed by the courts, police, and in many cases by persons requesting information for the purposes of determining eligibility for housing, school, employment etc. The dissemination of juvenile records is not unlimited. If access to these records is going to be restricted, penalties should also be implemented to deter those who attempt to access those records illegally.

Currently Section 178 of Chapter 6 of Mass. Gen. Laws imposes a fine not to exceed $7500 on any person who, "willfully requests, obtains or seeks to obtain criminal offender record information under false pretenses, or who willfully communicates or seeks to communicate criminal offender record information to any agency or person."[210]

Penalties such as those offered by Section 178 of Chapter 6 of Mass. Gen. Laws can act as a deterrent to unlawful dissemination of confidential records. However, the statute only deals with "willful" conduct. Not every instance of a record being shared is intentional. With these documents being shared between so many different parties and agencies, there are many opportunities for mistake and carelessness in disseminating juvenile record information. Penalties which address "careless" or "wanton" behavior could reduce the amount of mistaken and improper sharing of information. Importantly, laws such as these which impose a statutory penalty, create a cause of action, where none existed before for persons who suffer a consequence when their record is used or shared improperly.

[210] This was part of the New CORI reform legislation passed in 2010; previously the fine for illegally disseminating juvenile records was not to exceed $750. The fine for disseminating adult record went from a max of $500 to $5,000.

As with any penalty, the provisions will be ineffective if they are not properly enforced, and there is the risk that persons in choosing not to comply may begin intentionally camouflaging the illegal dissemination of records.

Conclusion

Over the course of the academic year the Law Office has researched the maintenance of juvenile records both in Massachusetts and across the rest of the country. Our research has shown individual states juvenile justice systems vary widely in terms of the maintenance and protection of these records. This is due, mainly, to the fact that each state is involved in an ongoing public policy debate over the tension between rehabilitation and concern for public safety. Massachusetts currently offers sealing by petition as a means to further the protection of juvenile records. However, it is rarely used.

The legislative history and case law behind the current Massachusetts system highlights how the Commonwealth has arrived at its current practice regarding juvenile records and identifies the obstacles that reform efforts may face. Currently, there is a bill, H.B. 1298, pending before the Massachusetts Joint Committee on the Judiciary that would allow a juvenile to petition the court to expunge juvenile records relating to the delinquency proceeding and any other court-ordered disposition. The petition could be filed after completion of the sentence imposed by the adjudication terminates. This bill is certain to be controversial given the current public policy debates over juvenile record retention.

The Law Office interviewed people in Massachusetts who are involved in some way with the juvenile justice system on both sides of the policy debate. Opinions ranged greatly over the effectiveness of the current record maintenance system and possible ways to improve on it. Some interviewees were in favor of automatic sealing or expungement, while others thought that the current system works well to protect

confidentiality and social welfare. Though the interviewees' opinions were varied about the effectiveness of the current Massachusetts' system of juvenile record maintenance, the information gathered led the Law Office to conclude that reform for the current system is an important issue that should be addressed.

The Law Office's believes implementing extensive diversion programs would be the optimal way to prevent the collateral consequences relating to juvenile records. Keeping troubled juveniles out of the institutional judicial process obviates the formation of records in the first place and connects the individual with support networks and means for treatment that tend to prevent repeat offenses. A diversion program is closely aligned with the original goal of juvenile justice system, which was to treat the child in need of aid as a parent would, by providing encouragement and guidance, not by punishing them or treating them as a criminal.

If diversion programs are not feasible, the Law Office believes that the optimal method for treatment of generated records would be a tiered system of automatic expungement and expungement by petition, depending on the severity of the offense.

In any scenario where the charges are dropped, dismissed, or do not result in a delinquent adjudication the arrest and court records would be expunged automatically. When the juvenile is adjudicated delinquent for offenses that would be considered misdemeanors if tried as an adult, the records would be expunged two years after the successful completion of the juvenile's disposition, to ensure the juvenile did not commit a repeat offense, with the stipulation that the District Attorney would have the opportunity to object. If an objection was raised the request for expungement would be reviewed by the court.

Finally, when the juvenile is adjudicated delinquent for an offense that would be considered a felony if tried as an adult, the juvenile can petition the court for expungement two years after the successful completion of her disposition of the first offense assuming no subsequent offenses occurred in the interim. This would be the most effective approach for dealing with juvenile records after they have been generated and would closely adhere to the original philosophy of the juvenile justice system, which is to allow juveniles the opportunity to rehabilitate and transition into becoming contributing members of society.

The Law Office believe these proposals, together with the suggestions for modifying the contents of the CORI record and the various propositions listed in the Further Reform Options section, provide a broad, effectual approach to improving the Massachusetts juvenile justice system.